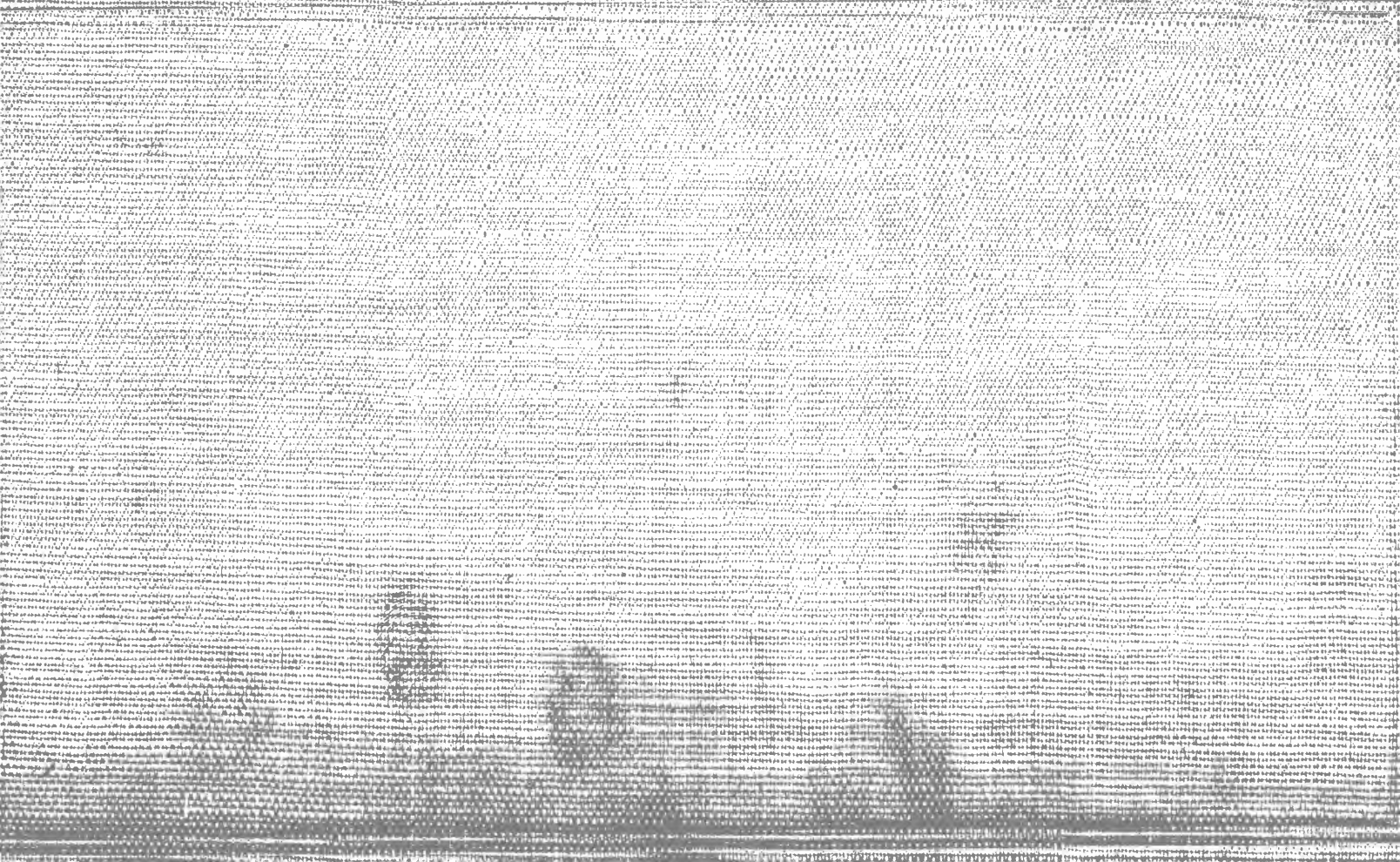

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book, or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1240

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE MONTANA MINING COMPANY, LIMITED,
*Plaintiff in Error,*
*vs.*
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
*Defendant in Error.*



## TRANSCRIPT OF RECORD.

**Error to the Circuit Court of the United States for the District of Montana.**

THE FILMER BROS. CO. PRINT, 424 SACRAMENTO ST., S. F.

Records of Circuit Court

of appeals

329

# INDEX

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED,
Defendant.

**Caption.**

Be it remembered that on the twenty-sixth day of June, 1899, the plaintiff herein filed its second amended and supplemental complaint, which is in the words and figures as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff,
vs.
MONTANA MINING COMPANY,
Defendant.

**Second Amended and Supplemental Complaint.**

Now comes the plaintiff in the above-entitled action, and for a second amended and supplemental complaint,

by leave of the Court first had and obtained, complains of the defendant herein, and for cause of action alleges:

I.

That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then territory (now State) of Montana, under the corporate name of St. Louis Mining and Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State.

II.

That at the times hereinafter mentioned this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz Lode Mining Claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis Lode Mining Claim, although such veins, lodes or

ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis Quartz Lode Mining Claim, which is situated in Ottawa Mining District, in the county of Lewis and Clarke, and State of Montana, and more particularly described as follows, to wit:

Beginning, for the description of lots Nos. 54 and 55 A at corner No. 1, a granite stone 16 by 12 by 12 inches, marked "1 M. C. 54," a mound of stones alongside, from which the quarter-section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian bears south 74 degrees and 15 minutes east, 353 feet distant.

Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet, intersect line betwen townships 11 and 12 north of range 6 west, a granite stone 15 by 14 by 12 inches, marked "54 M. C. 55 A," 450 feet to a point from which a shaft bears north 67 degrees, west 285 feet distant, and from said shaft an open cut, 3 by 5 feet, 100 feet long, runs south 54 degrees east; 655 feet to a point from which a shaft bears west 153 feet distant, 1097 feet to corner No. 2, a slate stone 20x12x5 inches, marked "2 M. C. 55 A," a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner No. 3, a slate stone 14 by 10 by 4 inches, marked "3 M. C. 55 A," a mound of stones alongside, from which the

southeast location corner bears south 10 degrees east 435 feet distant.

Thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 by 9 by 7 inches, marked "4 M. C. 55 A," a mound of stones alongside, from which the southwest location corner bears south 79 degrees west, 182 feet distant.

Thence fourth course, magnetic variation 18 degrees east, north 51 degrees 15 minutes east, 425 feet to corner No. 5, a granite stone 16 by 12 by 6 inches, marked "5 M. C. 55 A," a mound of stones alongside.

Thence,, fifth course, magnetic variation 19 degrees east, north 21 degrees 45 minutes east, 529 7-10 feet distant, intersects said township line, a granite stone 18 by 16 by 7 inches, marked "54 A. 54 M. C.," 1069 feet to corner No. 6, a granite stone 18 by 12 by 6 inches, marked "6 M. C. 54 A," from which a fir tree 13 inches in diameter, marked "6 M. C. 54 B. T," bears north 15 degrees east 24 feet distant, and a pine tree 5 inches in diameter, marked "C. M. C. 54 B. T.," bears south 54 degrees east, 21 5-10 feet distant.

Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east 515 5-10 feet to corner No. 1 of lot No. 40, the Drumlummon Lode Claim, 579 feet to corner No. 1, the place of beginning, said lots Nos. 54 and 55 A extending 1500 feet in length along said St. Louis vein or lode, the granted premises in said lot containing 18 acres and ninety-three hundredths of an acre.

Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode Mining Claim, which said fractional portion of said St. Louis Lode Mining Claim is described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis lode claim, between corners two and three thereof, 226 feet to a point on the boundary line of the St. Louis lode, between corners one and two; thence south 20 degrees 28 minutes west along said boundary, between corners one and two, 60 5-10 feet to corner No. 2 of the St. Louis lode; thence south 51 degrees 30 minutes west 403 feet to corner No. 3 of said St. Louis lode; thence north 45 degrees 30 minutes west along the line of boundary of the said St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844 50-100 square feet, together with all mineral contained therein.

III.

That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and

fully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis Mining Claim, and commenced extracting quartz, rock and ore therefrom, and removing the same, and converting it to its own use and benefit, and are now still removing and converting the same, which said quartz, rock and ore is of the value of two hundred thousand dollars; on account thereof this plaintiff has been damaged in said sum.

That since the filing of the original complaint herein, and up to the twentysixth day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of four hundred thousand dollars, and to the damage of this plaintiff in said sum.

Wherefore, plaintiff prays judgment for the said sum of six hundred thousand dollars, together with its costs and disbursements in this behalf expended.

TOOLE, BACH & TOOLE.

Attorneys for Plaintiff.

United States of America,
State of Montana, } ss.
County of Lewis and Clarke.

On this twenty-fourth day of June, A. D. 1899, personally appeared before me, Harry Harris, a notary public in and for the said county and State, William Mayger, general manager and superintendent of the St. Louis Mining and Milling Company of Montana, the plaintiff corporation above named, who being by me duly sworn, deposes and says: That he is the general manager and superintendent of said company and familiar with its business; that he has read the foregoing bill of complaint, and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-fourth day of June, A. D. 1899.

HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, State of Montana.

[Endorsed]: No. 291. (Title of Court and Cause.) Second Amended and Supplemental Complaint. Filed and entered June 26, 1899. Geo. W. Sproule, Clerk.

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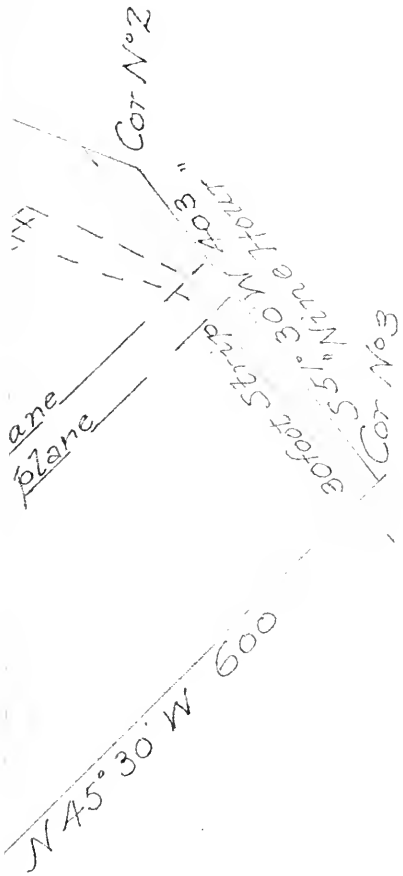


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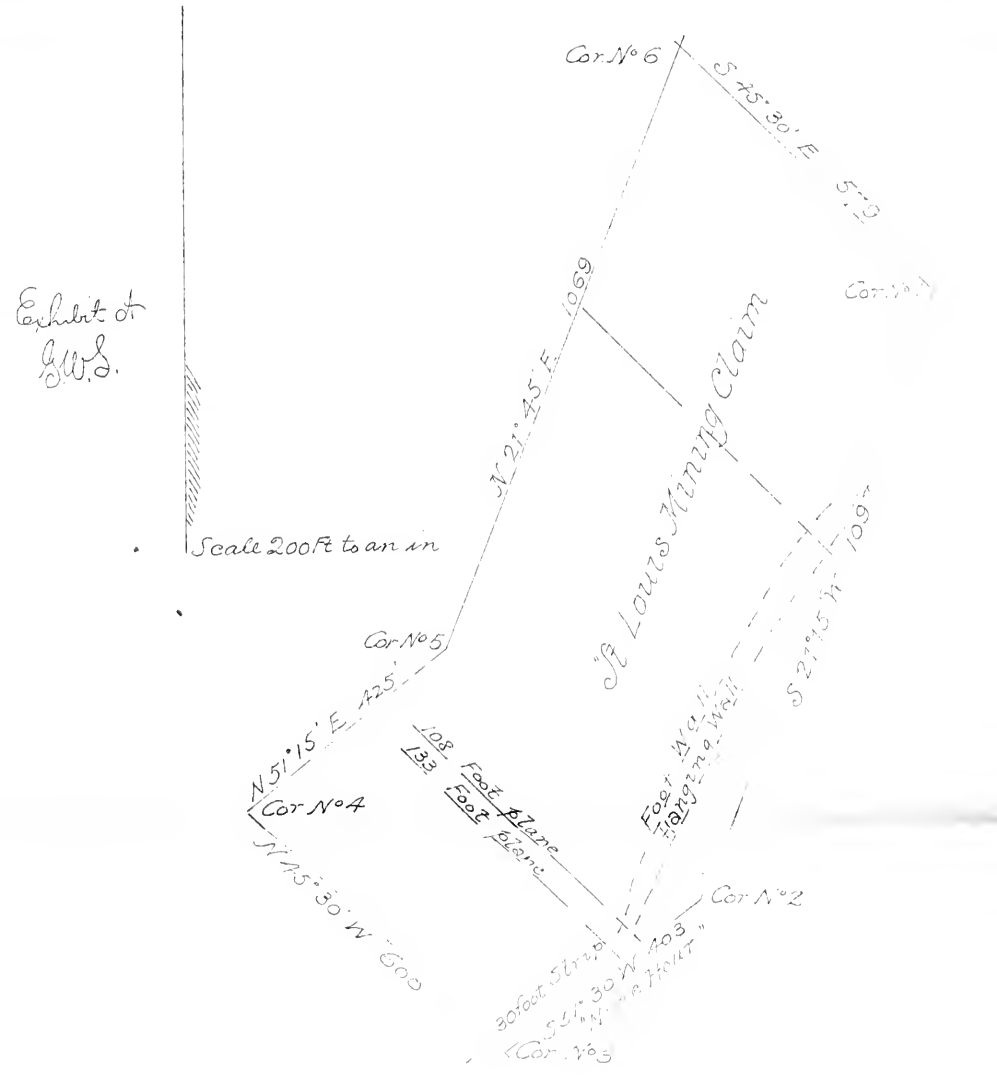
Exhibit of G.W.S.
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St Louis Mining Claim
Cor No 5
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Cor No 4
N 45° 30' W 600
108 Foot Plane
133 Foot plane
Foot Walls
Hanging Wall
S 21° 15' W 109
Cor No 2
30 foot Strip
S 51° 30' W 403
Cor No 3

The summons in this cause as heretofore issued being in the words and figures as follows, to wit:

*United States of America, Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff,
vs.
MONTANA MINING COMPANY (Limited), RAWLINSON T. BAYLISS, ALEXANDER BURRELL, NICHOLAS FRANCIS, ISAAC WARREN, JOSEPH HARVEY, JOHN JEWELL and THOMAS HOWKINS,
Defendants.

Action brought in the said Circuit Court, and the complaint filed in the office of the Clerk of said Circuit Court, in the city of Helena, County of Lewis and Clarke.

## Summons.

The President of the United States of America, Greeting:

To Montana Milling Company (Limited), Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell and Thomas Howkins:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the

District of Montana, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Helena, and county of Lewis & Clarke, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover a judgment against you, said defendants, for the sum of two hundred thousand damages, sustained by plaintiff from you, said defendants, for wrongfully, unlawfully and willfully, on or about the thirtieth day of June, 1893, entering upon one of the veins, lodes or ledges bearing gold, silver, lead and other precious metals, and having its top or apex within the surface location of the St. Louis Quartz Lode Mining Claim, the property of said plaintiff; and within the vertical planes thereof, and extracting therefrom and taking large quantities of ore and quartz-rock bearing gold, silver, lead and other precious metals lying within the premises of said plaintiff, and which you have converted to your own use and benefit (for a more particular description of said premises you are hereby referred to the complaint), all of which will more fully appear by reference to the complaint on file herein, a copy of which is herewith served, and for costs of suit. And if you fail to appear and plead, answer or demur, as herein required, your default will be entered, and the plaintiff will apply to the Court for the relief demanded in the complaint.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this eighteenth day of September, one thousand eight hundred and ninety-three, and of our independence the one hundred and eighteenth.

[Seal] GEO. W. SPROULE,
Clerk.

United States Marshal's Office,
District of Montana.

I hereby certify that I received the within writ on the nineteenth day of September, 1893, and personally served the same on the twentieth day of September, 1893, on the Montana Company, Limited, a corporation, by delivering to and leaving with Rawlinson T. Bayliss, agent and general manager of the said corporation, on Rawlinson T. Bayliss personally, and Alexander Burrell, Isaac Warren, Jos. Harvey, Nicholas Francis, John Jewell and Thomas Howkins, said defendants named therein, personally, at Marysville, county of Lewis & Clarke, in said District, a certified copy thereof, together with a copy of the complaint, certified to by the clerk of the United States Court.

Helena, Sept. 21, 1893.

WM. F. FURAY,
United States Marshal.
By Geo. A. Lecressy,
Deputy.

[Endorsed]: No. 291. (Title of Court and Cause.) Summons. Filed Sept. 25, 1893. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the thirtieth day of June, 1899, the answer of defendant was filed herein, being as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY,
Plaintiff,
vs.
MONTANA MINING COMPANY (Limited),
Defendant.

**Answer to Second Amended and Supplemental Complaint.**

Comes now the defendant above-named, and for its answer to the second amended and supplemental complaint of plaintiff on file herein, says:

I.

It admits the allegations contained in paragraphs numbered 1, 2 and 3 of the said second amended and supplemental complaint.

II.

It denies each and every other allegation in the said second amended supplemental complaint contained.

III.

And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached marked Exhibit "A," and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis Lode Mining Claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or about the sixth day of Septem-

ber, A. D. 1894, commenced an action in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein this defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the first day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute and deliver to this defendant a good and sufficient conveyance in fee-simple absolute, free from all encumbrances for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order and decree the said plaintiff, on or about the first day of July, A. D. 1895, made and executed a deed to this defendant of and for the said premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereunto annexed, marked Exhibit "B," and made a part of this answer. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or thirty-foot strip aforesaid, or any mineral contained therein.

Wherefore, having fully answered, the defendant prays to be hence dismissed without day, and for its costs in this behalf expended.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

State of Montana,
County of Lewis and Clarke. } ss.

Alexander Burrell, being first duly sworn, deposes and says: the above-named defendant is a corporation, and I am an officer thereof, to wit, I am its general manager; I have read the foregoing answer and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information, and belief.

ALEXANDER BURRELL.

Subscribed and sworn to before me this thirtieth day of June, A. D. 1899.

W. E. CULLEN, Jr.,
Notary Public in and for the county of Lewis & Clarke, Montana.

**Exhibit "A."**

Know all men by these presents, that I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the District Court of the Third Judicial District, Lewis & Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger, for patent, now pending in the United States landoffice at Helena, Montana.

Now, then, in consideration thereof, and in the further consideration of one dollar, to the said Charles Mayger in hand paid, by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises, and agrees to proceed at once upon his application now pending in the United States landoffice at Helena, Montana, for a patent to the St. Louis Lode Claim described therein, and situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a government patent therefor, and, when such title shall have been procured according to said application, said Charles Mayger hereby covenants, promises, and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute, and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece, or parcel of mining ground, situate in

Lewis & Clarke county, Montana territory, and comprising a part of two certain quartz lode mining claims, known as the St. Louis Lode Claim and the Nine Hour Lode Claim, and particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six feet (226) to a point on the boundary line of the St. Louis lode between corners one and two; thence south 20 degrees, 28 minutes west along said boundary line, between corners one and two, 60.5 feet to corner No. 2, of St. Louis lode, 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees, 10 minutes west along the line of boundary of St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees, 28 minutes east along a parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12.844.50 square feet, together with all the mineral therein contained. And if the said Charles Mayger, his heirs or assigns, shall make, execute, and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void, otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [Seal]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [Seal]

Witness:

J. K. TOOLE.

Territory of Montana,
County of Lewis & Clarke. } ss.

On the seventh day of March, eighteen hundred and eighty-four, personally appeared before me, R. H. Kemp, a notary public in and for the said county of Lewis & Clarke, Territory of Montana, Charles F. Mayger, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in the certificate first above written.

[Notarial Seal]

R. H. KEMP,
Notary Public.

Filed and recorded March 8, 1884, at 3 P. M. O. B. Totten.

**Exhibit "B."**

## DEED TO ST. LOUIS MINING AND MILLING CO. OF MONTANA TO MONTANA MINING CO., LTD.

This indenture, made and entered into this first day of July, in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining & Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, by William Mayger of the county of Lewis and Clarke and State of Montana, its duly authorized agent and attorney in fact, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to its assigns forever, all and singular those certain premises, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 de-

grees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode Claim between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of the said St. Louis Lode Claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the said boundary line of the St. Louis Lode Claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said

premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, with the appurtenances and privileges thereto incident, unto the said party of the second part and its assigns forever.

In witness whereof, the said William Mayger, as attorney in fact and agent as aforesaid for the said party of the first part, has hereunto subscribed its name, set his hand and seal this first day of July, A. D. 1895, as its said agent.

ST. LOUIS MINING & MILLING CO. [Seal]
By WILLIAM MAYGER,
Its Agent and Attorney in Fact.

State of Montana,
County of Lewis & Clarke. } ss.

Be it remembered that on this first day of July, A. D. 1895, personally appeared before me, Harry H. Yeager, a notary public in and for county of Lewis & Clarke, and State of Montana, the St. Louis Mining & Milling Company of Montana, by and through William Mayger, its duly authorized agent and attorney in fact, personally known to me to be the same person described in and who executed the said foregoing instrument as such agent and attorney in fact, who duly acknowledged to me that, as such agent and attorney in fact, he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this the day and year first herein in this certificate written.

[Notarial Seal] HARRY H. YEAGER,
Notary Public.

[Endorsed]: No. 291. (Title of Court and Cause.) Answer to Supplemental Complaint. Filed and entered June 30, 1899. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the fourteenth day of July, 1899, the replication of said plaintiff was filed, being as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff,
vs.
MONTANA MINING COMPANY, Limited,
Defendant.
No. 291.

**Replication.**

And the said plaintiff, for replication to the answer of the said defendant and the new matter set up by way of estoppel in said defendant's answer, waiving no objections to the competency of the same in this action at law, as to the third paragraph in said answer, denies that

plaintiff is estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from claiming any of the mineral found, or that may be at any time hereafter found, in said thirty-foot strip or compromise ground.

Admits that the said bond was executed as in said answer stated, and avers that the same was executed and made on account of an application of the said Mayger for a patent to the said St. Louis Lode Mining Claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said thirty-foot strip or compromise ground, as being a part of what is known as the said Nine Hour Quartz Lode Mining Claim.

Admits that the said Mayger agreed to convey said thirty-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and avers that the said claim of plaintiff comprises no minerals contained in or beneath said thirty-foot strip or compromise ground, except such as is contained in leads, lodes, or ledges, which have their tops or apexes within the St. Louis Quartz Lode Mining Claim, exclusive of said thirty-foot strip or compromise ground.

And the said plaintiff further avers that it is seeking to recover only such quartz-rock or ore and the value thereof, and the damages for the removal and conversion of the same, as comprises lodes, leads or ledges having their tops or apexes within the boundary lines of the said St. Louis Lode Mining Claim, exclusive of the said thirty-foot strip or compromise ground.

Admits that said Mayger obtained a patent for the said thirty-foot strip or compromise ground, but denies that any conveyance was made by him to plaintiff to defraud any one, and avers that all matters in relation thereto have been concluded by the judgment of the Court and the deed mentioned in said defendant's answer executed in pursuance thereof.

And the said plaintiff, for further replication to the new matter set up in the said defendant's answer, shows unto this Honorable Court that the said thirty-foot strip or piece of compromise ground comprised a part and portion of what was known as the Nine Hour Lode Claim mentioned in the said defendant's answer, and that no other right or title has been conveyed by reason of the said deed than such as attached and incident to the said thirty-foot strip or compromise ground, and that the minerals therein contained were intended to compromise and did comprise only such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of the said thirty-foot strip, all of which will more fully appear by reference to a certified copy of the judgment-roll in the case hereinbefore referred to and filed in the equity suit in aid of this action, and which plaintiff asks may be considered in this cause as though reproduced and fully set forth at large.

And plaintiff alleges the fact to be that the said thirty-foot strip or compromise ground was at all times a part and portion of the quartz-lode mining claim, known as the Nine Hour Claim, and that the same was never a part or portion of the St. Louis Quartz Lode Mining Claim

mentioned in the complaint herein, and that in an action heretofore pending between the parties hereto in District Court of the First Judicial District of the State of Montana, in and for the county of Lewis & Clarke, in which said action the defendant herein was plaintiff, and this plaintiff and Charles Mayger, one of its predecessors in interest, were defendants, which said action was based upon the agreement mentioned in said answer and was brought for the purpose of compelling the defendants therein, in accordance with said agreement, to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the thirty-foot strip or compromise ground and mentioned in the answer in this action, it was found and determined by the Court, as a matter of fact, that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour Lode Mining Claim, and was by the parties to said agreement agreed to be a part thereof, and that the said agreement with the said Charles Mayger, a copy of which is attached to the amended answer herein, was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, the boundaries of which claims had been and were at the time of the execution of the said agreement in conflict, and concerning which a controversy then existed between the parties to said agreement; and plaintiff further alleges that the deed mentioned in said answer, and a copy of which is annexed thereto, is the deed which the Court

adjudged in said action should be executed for the purpose of performing the agreements above referred to.

Wherefore, plaintiff demands judgment as heretofore demanded in its amended and supplemental complaint.

E. W. TOOLE and
THOMAS C. BACH,
Attorneys for Plaintiff.

State of Montana,
County of Lewis & Clarke. } ss.

William Mayger, being duly sworn, deposes and says: That he is an officer, to wit, the superintendent and general manager of the above-entitled plaintiff, which is a corporation; that he has read the foregoing replication, and knows the contents thereof; and that the matters stated therein are true to his best knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this fourteenth day of July, 1899.

[Seal] HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, Montana.

Due and timely service of a copy of this replication acknowledged and admitted this fourteenth day of July, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

[Endorsed]: No. 291. (Title of Court and Cause.) Replication. Filed and entered July 14, 1899. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 7th day of July, A. D. 1905, the verdict of the jury was filed herein, which is in the words and figures as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY,
Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED,
Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff, and assess its damages at the sum of one hundred and ninety-five thousand and no/100 ($195,000.00) dollars.

H. G. PICKETT,
Foreman.

[Endorsed]: No. 291. (Title of Court and Cause.) Verdict. Filed and entered July 7th, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of July, A. D. 1905, a judgment was duly entered herein which is as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY (a Corporation), Plaintiff,

vs.

MONTANA MINING COMPANY, LIMITED (a Corporation), Defendant.

## Judgment.

Be it remembered, that on the 29th day of May, A. D. 1905, the above-entitled cause came on for hearing, and the same having been duly submitted to a jury of twelve lawful men duly impaneled and sworn to try the issues herein, the following verdict was duly returned into court, to wit: "Title of Court—Title of Cause.

We, the jury in the above-entitled cause find for the plaintiff, and assess its damage at the sum of one hundred and ninety-five thousand dollars ($195,000.00).

H. G. PICKETT,
Foreman."

It is therefore considered, ordered and adjudged, that the plaintiff have and recover from the said defendant the sum of one hundred and ninety-five thousand dollars ($195,000.00), together with its costs in this behalf expended, taxed at the sum of nine hundred twenty-six and 80/100 dollars ($926.80), and that it have execution therefor.

Dated this 7th day of July, A. D. 1905.

Judgment entered July 7th, 1905.

[Seal] GEO. W. SPROULE,
Clerk.

Attest a true copy of judgment as entered.

[Seal] GEO. W. SPROULE,
Clerk.

United States of America,
District of Montana. } ss.

I, Geo. W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 7th day of July, 1905.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 291. (Title of Court and Cause.) Judgment-roll. Filed and entered July 7th, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 14th day of August, A. D. 1905, a bill of exceptions was duly allowed, signed, and thereafter filed, which is as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff,

vs.

MONTANA MINING COMPANY, LIMITED,
Defendant.

## Bill of Exceptions.

Be it remembered that the above-entitled cause came on for a retrial on the 31st day of May, A. D. 1905, that being one of the days of court of the April term of said court, on a remittitur from the Circuit Court of Appeals, of which the following is a copy, to wit:

### Remittitur.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable, the Judges of the Circuit Court of the United States for the District of Montana, Greeting:

Whereas, lately in the Circuit Court of the United States for the District of Montana, before you, or some of you, in a cause between the St. Louis Mining and Milling

Company of Montana, Plaintiff, and the Montana Mining Company, Limited, Defendant, No. 291, a judgment was duly filed and entered, which said judgment is of record in the said cause in the office of the clerk of said Circuit Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as fully and at large appears by the inspection of the transcripts of the record of the said Circuit Court, which were brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of, respectively, a writ of error on behalf of the Montana Mining Company, Limited, allowed on the 7th day of October, in the year of our Lord one thousand eight hundred and ninety-nine, entitled The Montana Mining Company, Limited, vs. The St. Louis Mining and Milling Company of Montana, No. 567, and a writ of error on behalf of the St. Louis Mining and Milling Company of Montana, allowed on the 30th day of January, in the year of our Lord one thousand nine hundred, entitled, The St. Louis Mining and Milling Company of Montana v. The Montana Mining Company, Limited, No. 594, agreeably to the act of Congress in such cases made and provided;

And whereas, on the 9th day of February, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Circuit Court of Appeals, on the transcript of the record upon the said writ of error on behalf of The Montana Mining Company, Limited, and was duly submitted;

And whereas, on the 14th day of May, in the year of our Lord one thousand nine hundred, in the said cause upon

the said writ of error on behalf of the Montana Mining Company, Limited, a judgment was duly filed and entered by the said Circuit Court of Appeals affirming the said judgment of the said Circuit Court; from which judgment of the said Circuit Court of Appeals, a writ of error on behalf of the Montana Mining Company, Limited, was thereafter duly sued out and allowed to the Supreme Court of the United States;

And whereas, on the 14th day of May, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Circuit Court of Appeals on the transcript of the record upon the said writ of error on behalf of the St. Louis Mining and Milling Company of Montana, and was duly submitted;

And whereas, on the 8th day of October, in the year of our Lord one thousand, nine hundred, in the said cause upon the writ of error on behalf of the St. Louis Mining and Milling Company of Montana a judgment was duly filed and entered by the said Circuit Court of Appeals reversing the said judgment of the said Circuit Court and remanding the cause for a new trial in respect to certain alleged damages; from which judgment of the said Circuit Court of Appeals a writ of error on behalf of The Montana Mining Company, Limited, was thereafter duly sued out and allowed to the Supreme Court of the United States;

And whereas, on the 19th day of May, in the year of our Lord one thousand nine hundred and two, as appears from the mandates issued out of the said Supreme Court

of the United States to the said Circuit Court of Appeals and filed on the 9th day of June thereafter, the aforesaid writs of error on behalf of the Montana Mining Company, Limited, sued out and allowed to the said Supreme Court of the United States as aforesaid, were dismissed, for the want of jurisdiction;

And whereas, on the 6th day of October, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said Circuit Court of Appeals on the said transcripts of the record and the petition of the Montana Mining Company, Limited, for the issuance of a single mandate in the cause, etc., and was duly submitted;

And whereas, on the 8th day of October, in the year of our Lord one thousand nine hundred and two, the following judgment was duly filed and entered:

*"United States Circuit Court of Appeals for the Ninth Circuit.*

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff in Error,
vs.
THE MONTANA MINING COMPANY, Limited,
Defendant in Error.

Nos. 567 and 594.

In error to the Circuit Court of the United States for the District of Montana.

This cause having come on to be heard on the transcripts of record from the Circuit Court of the United States for the District of Montana upon the writ of error sued out by The Montana Mining Company, Limited, Plaintiff in Error, vs. The St. Louis Mining and Milling Company of Montana, Defendant in Error, and upon the writ of error sued out by The St. Louis Mining and Milling Company of Montana as Plaintiff in Error vs. The Montana Mining Company, Limited, as defendant in error, both writs of error being sued out to correct errors

charged concerning the same judgment, and said causes having been argued and submitted by counsel, and separate judgments having been made and entered therein at different dates, and the Court having by its last judgment herein reversed the judgment of the said Circuit Court:

It is now ordered and adjudged, that the judgments so heretofore made and entered herein be vacated and set aside, and that in lieu thereof it is ordered and adjudged that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs, and the cause is remanded to said Circuit Court for a new trial."

You, therefore, are hereby commanded that such new trial and further proceedings be had in said cause in accordance with the judgment of this Court filed and entered on the 8th day of October, in the year of our Lord one thousand nine hundred and two, and as according to right and justice and the laws of the United States ought to be had, the said judgment of the said Circuit Court notwithstanding.

Witness, The Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 10th day of October, in the year of our Lord one thousand nine hundred and two.

F. D. MONCKTON,

Clerk.

Taxation of costs: Total taxes at $242.50.

[Endorsed]: Title of Court. Title of Cause. Remittitur. Filed and entered Oct. 31, 1902. Geo. W. Sproule, Clerk. By F. H. Drake, Deputy Clerk.

The jury having been duly impaneled and sworn to try said cause, the plaintiff to maintain the issues on its part introduced and had sworn one John R. Parks who testified substantially as follows, to wit:

JOHN R. PARKS.

I am a consulting mining engineer and have followed my business for twenty-five years. I entered the employment of the plaintiff in this case in that capacity about the year 1892, and have been continually in its employ since that time, though I have been engaged in other matters during that period. As such engineer, I assisted in making the map used in this case known as Plaintiff's Exhibit No. 1. My associate in that work was Mr. James Keerl, who is a civil engineer by profession. The map is a colored photograph from a tracing of the original working mining map and it is a correct representation of the exterior boundaries of the St. Louis claim so far as exhibited. It is very accurate throughout.

The photograph, in order to distinguish levels, was colored by Mr. Keerl and myself as you see on this map. The map is, what is termed by engineers, a plane map. In other words, it is a map on a horizontal plane and as if you were looking down on the object depicted. As to the colors, the 400-foot level appears in a dark gray, the 85-foot level in a brownish yellow, the 40-foot level in red, the 20-foot level in yellow, the 50-foot level in blue, the 190-foot level in brick red. The connection on the vein either from level to level, or from the surface to a given level, is either a shaft when it comes from the surface, or

(Testimony of John R. Parks.)

a winze when it comes from level to level. When we look down from the surface, a shaft appears to us simply as a straight line and is represented on the map in black parallel lines. The Montana nine hour shaft is from the surface to the 190-foot level. Now, as that shaft does not run in a straight line on that vein, the lines change to an angle to show that fact. As looking down from above, you could see only the top of a shaft, it is depicted on the map by a square, a part of which is in deep black and the other in outline. The stoped ground shown in the southeasterly portions of the map is outlined in black lead pencil which gives it a dark grey figure. The plane, called datum plane, upon which this map is drawn, is the assumed altitude of corner No. 2, 2,000 feet, so that anything that is under two thousand feet is below the datum plane, anything that is above it is up higher on the hill.

The vein is found on the flank of a mountain, the surface of which is very irregular. The mountain rises at an angle of about 30°. The 520-foot plane is 520 feet from corner one, and is parallel to the north end line and is marked on the map "projected line parallel to the end line 520-foot plane." The 108-foot plane and the 133 plane are also designated and are respectively 108 and 133 feet distant from the intersection of the west side line of the 30-foot strip with the east side line of the St. Louis claim between corners one and two. On this map when you find a level defined in the same color and two parallel lines connected with a color connection, that is a cross-

(Testimony of John R. Parks.)

cut. The 65-foot shaft is a shaft sunk on the St. Louis discovery vein. The 65-foot cross-cut is 87 feet below the 85-foot level. The points marked "discovery shaft" and "discovery drift" show the location of workings on the discovery vein. What is designated on the map in sort of a bluish green color, is the Transcontinental tunnel which is driven on a fault fissure. Following along the line of the Drumlummon lode are surface cuts marked on the map. These are outlined in black ink and marked and numbered as cut No. 12, No. 13, etc.

Cross-examination.

I first became acquainted with the vein or lode in controversy in '91 or '92. My work was not entirely for the purpose of getting evidence for lawsuits, pending between these parties, but a good part of it was for that purpose. The surveys for this map were made in 1892 or 1893. The complaint in this action was filed in '93. I assisted Mr. Keerl in making the surveys and in drawing the maps. The boundary lines were taken from the United States patents. The west line of the nine hour does correspond to the line shown on the patent. The map shows the west side line of the nine hour to the point where it intersects the south boundary of the St. Louis claim. On the diagram in the patent a line is shown from the point of such intersection to corner numbered 1 of the nine hour but the area thus shown in conflict with the St. Louis is expressly excluded in the patent.

Plaintiff also called and had sworn as a witness in its behalf who testified as follows, to wit:

WILLIAM MAYGER.

I reside at Marysville, Montana. My business is mining. I have been engaged in that business for about 41 years, principally around Silver Camp and Marysville. I know the St. Louis Lode Claim. It lies southeast of the town of Marysville on the side of a mountain, known as Cruse mountain. The original location of the St. Louis Lode, was at the point marked on the map as the 65-foot shaft. There is a vein connected with that original discovery.

Whereupon the witness was asked the following question:

Q. Which direction does it run?

To which the defendant objected on the ground that the same was irrelevant and immaterial. For that, the direction or strike of the discovery vein is not in issue, being no allegation whatever contained in the complaint relating to the strike or dip of the discovery vein, which objection was overruled by the Court, and the witness permitted to answer such question, to which said ruling of the Court, the defendant then and there excepted.

A. It runs very nearly parallel with the side lines of the St. Louis as staked. We have traced the vein to within 95 feet of the end line at the south end, and to a distance of about 400 feet from the north end. It dips to the east at an angle of about 80° from a horizontal. We have sunk on this vein, to a depth of about 425 feet.

(Testimony of William Mayger.)

The St. Louis company has extracted over forty-one thousand dollars' worth of ore out of the discovery vein in both the north and south drifts from the Transcontinental tunnel. That part of the vein disclosed in the southerly drift of the Transcontinental tunnel is developed on the lower levels to within 95 feet of the south end line, and it is a good, strong, vein at that point extending in the direction of the end line.

I know the Drumlummon vein. At the point on the map designated as the 520 foot plane, the hanging wall of the Drumlummon vein is within the St. Louis claim, by a distance of about 5 feet, and the apex is wholly within the St. Louis claim, from that point to the 108-foot plane. It runs parallel or comparatively so with the St. Louis, between corners numbered 1 and 2, and the dip is to the east, at an angle of 56 to 60 degrees at the surface, and on the lower levels as high as 70 or 72 degrees. I have examined the lower levels of the vein down to the 1600-foot level of the Montana company. The hanging-wall of this vein passes out of our surface at the 108-foot plane as marked on the map Plaintiff's Exhibit No. 1, and a part of the apex of the lode continues in our ground until it passes the 133-foot plane.

The Montana company has stoped out the ore above the 190 level up to the 108-foot plane. We have traced the hanging-wall clean up to the 108-foot plane, and the foot-wall to within 160 feet, I should judge, of the south end line. We have run levels on the walls, and traced them all through the levels. I have made this

(Testimony of William Mayger.)

vein a study for years. Our apex shaft No. 2 practically joins on the surface the Montana company's apex shaft, and lies south of the 108-foot plane, about 5 feet. The other side of the shaft is within about 15 feet of our 133-foot plane. The workings here are much caved. It is possible that one could climb down the Montana company's apex shaft, but it is much crushed and caved.

The 20-foot level shown on the map is marked in pale yellow. It starts from probably 60 or 75 feet west of its intersection with the east side line of the St. Louis ground and follows the vein in and connects with the Montana company's apex shaft. Underneath that level we started what is termed the Roadside tunnel; that is a cross-cut tunnel and penetrates the vein immediately under the St. Louis company's apex shaft, then it follows the vein south until it passes beyond the 133-foot plane, and from there it turns and runs back; runs west until it intersects the foot-wall of the vein. Below the 40-foot level and the roadside tunnel, we have got what we term the 85-foot level, which connects at the north end with the 30-foot level, on the hanging-wall of the vein north of the 520-foot plane, and connects that level with a raise in two places on the south end of that level. From that point it follows as near to the surface as it can. Immediately under the hanging-wall of the Drumlummon, it reaches the winze that connects the forty-foot level with the 85-foot level. The vein is disclosed under the hanging, its entire length up to that point. Within that distance there are a number of cross-cuts that run

(Testimony of William Mayger.)

to the foot-wall of the fissure or vein. The first cross-cut to the foot is at a point in the level marked "4" on the map, being one of the stations of the survey of the 85-foot level. The vein at that point is 21 or 22 feet in width. Going southerly along the level from that point a distance of about 60 feet, there is another cross-cut that runs to the foot-wall. From the end of this cross-cut is a level following the foot-wall clean through to immediately behind the winze of the St. Louis company, between the 40-foot level and the 85-foot level. From the foot to hanging-wall is a distance of about 17 feet. From where the 85-foot level terminates, going northerly for about 60 feet, the ore has been entirely stoped out up to the surface, by the St. Louis company, that is, the greater portion of the vein, leaving a lot of low-grade ore between the stope and the foot-wall. There is a brattice in the level at the bottom of the winze. I have found pay ore within 8 or 10 feet of the point where the 133-foot plane crosses the west line of the compromise ground and down below, I have found ore immediately underneath that point. Witness here produced a sample of the ore found beneath the crossing of the 133-foot plane.) I do not remember the exact point at which I found this ore, but think it was about 20 feet below the surface. The 85-foot level is partly in the gouge following the hanging-wall, with very little in it and has no particular value up to the point of the beginning of our stope.

(Testimony of William Mayger.)

From the portion of the vein that we stoped out, we realized $111,000.00 out of it. The average of it would be $100.00 a ton. We shipped a good deal of ore there that might be termed float in connection with the vein immediately below the apex. We were confined to a vertical plane on all sides by an injunction covering the thirty-foot strip. I have been in the premises of the defendant east of the west side of the line of the compromise strip. The ground at this point is stoped out from the surface down to the 190-foot level of the Montana company.

Whereupon the witness was asked the following question:

Q. Point out to the jury northerly of the 133-foot plane, where the stopes have been taken out.

To which question the defendant objected for the reason that the same is irrelevant and immaterial, for the reason that the stoping referred to lies north of the 133-foot plane, as drawn on the map, and is not confined to such stoping as has been done in that portion of defendant's ground where the apex of the lode is found in plaintiff's ground, lying north of the 108-foot plane. In other words that the inquiry relates to the territory lying between the two planes as drawn on the map, and that it has been established by the testimony and by the pleadings in the case, that between these planes the whole of the apex is not within the plaintiff's territory.

The Court in everruling said objection, said:

"I do not deem it necessary to consider with the very

(Testimony of William Mayger.)

strictest exactness the definite line between what is termed the law of the case and what may be called an advice by an appellate to an inferior court. But I hold this to be a correct principle, that where a trial court has ruled upon a material matter in one way, and an appeal is taken to a higher tribunal and such higher tribunal considers the question presented as necessary for its consideration, and does duly consider such question, and does express a positive opinion thereon, and makes a decision that the trial court erred in its refusal to admit evidence upon the direct question considered, and therefore remands the case for a new trial, it becomes the duty of the trial court upon such new trial to follow the opinion of the appellate tribunal, unless it should be made to appear that a substantially different state of facts exists from that upon which the appellate tribunal based its decision, or unless the appellate tribunal was clearly misled as to the facts by accident or omission of some kind, or unless the decision of the appellate tribunal or its reasoning has been reversed by a still higher tribunal.

"I find, upon the examination of the opinion of the Circuit Court of Appeals in this case, 104 Fed. 664, that the question considered was this: 'When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim, and partly within the other, to whom does such portion of the vein belong?' The Court an-

(Testimony of William Mayger.)

swered this question by referring to the opinions of the Supreme Court of the United States, stating that 'The only deduction which can be made from the foregoing views is that inasmuch as neither statute permits a division of the crossing portion of the vein, and the weight of authority favors a senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line.'

"Continuing, the Court says: 'It follows that the court below erred in its refusal to admit the evidence offered as to the value of ore taken from the Drumlummon vein on its dip between the planes designated as the 108-foot and the 133-foot planes, and the cause is therefore remanded for a new trial, as to damages alleged and recovery sought for conversion of ore between the planes indicated.'

"Any other general rule than that which I have laid down would be countenancing the doctrine that if a trial judge may entertain an opinion different from that expressed by the appellate tribunal within his circuit, he may, by refusing to follow such higher court, interfere with the orderly administration of judicial proceedings which very plainly must be preserved for the harmony of the entire system of jurisprudence. The effect of such a course would be to impair the stability of judicial decision by the higher courts and oftentimes to throw the burden of appeal upon him who has been declared in the right by the higher court, and as a consequence the ad-

(Testimony of William Mayger.)

ministration of justice would be unnecessarily delayed and confusion ensue.

"Were the difficult question presented, a new one to me apart from the advice of a learned Circuit Court of Appeals, the duty would, of course, devolve upon me to decide it by original opinion. Upon the point itself, which is complex, while I realize that there is force in the argument of the counsel for the defendant; on the other hand, the Circuit Court of Appeals, in making its deduction from the decision of the Supreme Court referred to in its opinion, rests upon the fundamental doctrine that the intent of the statute is to preserve to the miner the full benefit of his discovery, and that in expounding the law courts should not lose sight of the rule that if the miner has the apex in his location he is to have the vein, and the right of pursuit of the vein on its dip as defined by the statute, and that the senior locator, in the absence of statute and authority is to be favored under conditions of facts like those presented in this case.

"But as the rights of the parties hereto are to be determined upon this trial by the unmistakable language of the Circuit Court of Appeals, any reasoning of mine upon the question, which is difficult, would not be of material concern."

Thereupon the defendant added to its objection aforesaid that it was alleged in the pleadings and shown by the testimony, that the hanging-wall of the Drumlum-

(Testimony of William Mayger.)

mon vein passed out of the plaintiff's ground at the 108-foot plane.

But the Court overruled such objection and the whole thereof, to which ruling of the Court the defendant then and there duly excepted. And it was stipulated between counsel in open court that said objection should apply to all testimony that might be offered or given relative to any ores mined by the defendant, between the two planes as drawn down on the map. The same stipulation, it was agreed, should cover all testimony offered by plaintiff relating to the course or dip of its discovery vein, and that defendant need not further object to such testimony, the objection already made being sufficient.

A. The entire vein is stoped out between the 108 and the 133-foot planes, from the surface to the 190-foot level of the Montana company's works. There is a stope at the end of the 190-foot level from the 133-foot plane in beyond the 108-foot plane, possibly 30 or 35 feet. The last end of that level for a short distance has no stoping above it, but from the point where the stoping begins to the 133-foot plane, it has been stoped out up to the surface, by the defendant. There is a stope at the end of the 85-foot level which is entirely north of the 108-foot plane. There is also a stope commencing about 30 feet below the apex of the Montana company's shaft, and extending into the 20-foot level, probably 10 or 12 feet.

I am the general manager of the St. Louis Mining and Milling Company, and have been such manager since the

(Testimony of William Mayger.)

organization of that company. I think the ore extracted by the Montana company at the points named by me, was much better ore than that which we extracted north of the compromise line. I had Professor Parks and Mr. Keerl measure up the stopes taken out by the defendant and compute the number of tons that had been so taken. I took the sample of ore referred to by me, vertically under the 133-foot plane at the point marked "J" on the map at a depth of about a foot below the elevation of point "J," which would be about 65 feet below the surface of the datum line.

The stope at the end of the 190-foot level was taken out in the summer of 1893, also the stope on the 20-foot level. I believe this is termed Block 9. The stope marked Block 8 at the end of the 85-foot level was taken out in '98 or '99. These numbers were given these blocks by our surveyors at the time of the making of the survey. The value of the ore taken out by us ran from $50 to $300 a ton, estimating it in carload lots. In giving my valuations, I gave the valuation as net returns, not the assay value, but what we received back from the smelter, which was 95 per cent of the assay value, and deducted the cost which reached all the way from $12 to $24 a ton. The ore bodies mined out by us on our side of the line and the ore bodies mined out by the defendant on its side of the line adjoined each other. While the defendant was engaged in extracting this ore, I made efforts to get into its property to see it, but I only got in under an order of the Court. I was refused admission to their

(Testimony of William Mayger.)

mine, until I had obtained an order. I went in with Professor William B. Potter of St. Louis, in either 1894 or '95. I have also been in there with other persons since then under similar circumstances.

The location of the St. Louis was made in September, 1878, but there had been a prior location of the same ground. I was in Butte at the time it was located and I wrote from there to my brother Charlie, who was in Marysville, directing him to make the location. The location was made on what we term the 65-foot shaft.

Cross-examination.

The location was made by my brother, in his own name. I had no legal interest in it. I was one of the organizers of the St. Louis Mining and Milling Company. Mr. James Sommerville and Mr. Michael Karnett of St. Louis were also interested in it. After the company was organized, one-half of the stock was issued to me, and one-half of it to my brother Charlie. I presume I paid the expenses of patenting the claim and also the expenses of fighting the adverse suit. The company at the time of its organization had no other property than the St. Louis lode and millsite, except that $125,000.00 of the capital stock was put into the treasury. I have always been the manager of the company. The adverse suit was settled by the execution of the bond spoken of in the answer in this case. There was a demand made for the performance of the bond in the spring of 1887. I participated in the suit for the specific performance of the

(Testimony of William Mayger.)

bond. The suit was appealed to the Supreme Court of the United States, and resisted by the St. Louis Company. I executed the deed for the company under the order of the court. I had charge of the litigation between the parties to this action in the former suit. That case was tried in April and May, 1893.

I have no absolute knowledge as to my seeing the original notice of location posted at the 65-foot shaft. I assume that my brother Charlie made that discovery on the 65-foot shaft and assume that was his discovery shaft. What is marked here on the map as the discovery shaft was known as the discovery shaft of the Ivanhoe lode. I did not say to the jury on my direct examination that I saw the notice of location posted on the 65-foot shaft. If the notice of location was posted on the 65-foot shaft when I got back from Butte, I would assume that that was the discovery shaft of the St. Louis lode and should be so marked on this map. Tracing the lode on the surface, there is a shaft or prospect hole near the south line, but it is not connected with any of the underground workings. I assume that it is a continuation of the vein. There are no other workings on the surface near the south end in which the vein is shown. Its course, however, is shown by the stopes below. We commenced prospecting for the vein in 1876; we located the Ivanhoe. We did not hunt any more for the vein after 1878. In the bottom of the 65-foot shaft there is a level running south for a distance of 140 or more feet, the discovery vein dips to the east.

(Testimony of William Mayger.)

The level I speak of runs to the Transcontinental tunnel, that tunnel cuts the vein and throws the lead a distance of about 90 feet. The level that runs from the Transcontinental tunnel to the 65-foot shaft continues on in the same direction a distance of probably two or three hundred feet further. It is not on the map because it was never surveyed by an engineer.

In the Maskelyne shaft, the width of level on the Drumlummon vein appears to be about 7 feet wide as shown on the map. The narrowest point shown is about 4½ feet. In running the cross-cut from the bottom of the 65-foot shaft, we struck a bunch of quartz about midway. The breast of this cross-cut shows the Drumlummon vein.

The cross-cut is entirely through the vein up to the hanging-wall of the Drumlummon. The gouge on the hanging-wall of the Drumlummon appears in the Hopeful shaft, it also appears in the upraises from the 30-foot level to the surface, and from that point right along to the 85-foot level clean through. This gouge can be traced clear through the 85-foot level to where the brattice is, with the exception that at the south end of the 85-foot the ground has all been stoped out and it does not show there. It is continuous; sometimes it is two feet wide, sometimes only two or three inches wide, but there is always more or less of it. At Cut No. 14 as you stand where the track turns and look at the face of the 85-foot level, the gouge shows very clearly. In the cross-cut of the 65-foot shaft there is a bunch of ore in

(Testimony of William Mayger.)

there, I think, as far as I can judge, it dips to the west. That is my memory as it is pictured in my mind. The Transcontinental tunnel is marked on the map in green, the end of it is over in the Nine Hour ground, and under the Nine Hour ground a distance of probably thirty feet clear past the east side line of the Compromise strip. It runs to the north of these two apex shafts. The tunnel runs practically 500 or 600 feet underground and follows a fault in the granite. It is through porphyry and granite near the mouth of the tunnel. The dip of this fault is to the south. We left the fault at a point immediately under the easterly end of cut 18. I think our caps in this tunnel are 6 feet, I am not sure. There has been no work on the main shaft of the St. Louis on the north end since the shaft was built there. I could not give you the year exactly when the work was done. The 30-foot level north of the shaft is on the foot-wall possibly a distance of 30 feet. It trends towards corner No. 1 of the St. Louis location. It possibly extends northerly 30 feet from the main shaft. There is a cross-cut north of the shaft. I do not remember just how far from the shaft. The cross-cut is a cross-cut to the east. In cut No. 14, both walls of the vein appear 12 or 14 feet apart. At the point, cut No. 14, the vein is 12 or 14 feet wide. On the map of 1893, the apex is represented by a pink band showing a width of about 37 feet by scale. The Transcontinental tunnel fissure passed over the foot-wall of the Drumlummon vein and

(Testimony of William Mayger.)

crossed over the vein. We developed the foot-wall of the Drumlummon vein to within 150 feet of the south end line of the St. Louis vein at the 20-foot level. We had a workman on this end, on Saturday the 29th of May last, developing the foot-wall of the vein.

Whereupon witness was asked the following question:

Q. If that man were at work 78 feet below corner No. 3, and there had been any foot-wall there, will you tell me the width of that apex provided the hanging-wall took the course you indicated by your ruler from the 108-foot plane crossing through the Nine Hour shaft?

To which question the plaintiff objected for the reason that the question assumed a condition that the witness had not sworn to, and therefore not proper examination and immaterial.

Which objection was by the Court sustained.

Whereupon the defendant offered to prove in response to the question that the distance from the point indicated to the plane previously indicated by the witness from the 108-foot plane through the Nine Hour shaft, would be approximately 148-feet surface apex on the south end line.

To which offer the plaintiff objected upon the same grounds.

Which objection was by the Court sustained, and the defendant duly excepted thereto.

The Montana company took out a small stope of ore from their apex shaft running north on the 20-foot level.

(Testimony of William Mayger.)

That is the highest working outside of their shaft north. This ore that I am speaking of was taken out in '93. The ore that we took out to the northward of the 108-foot plane was west of the west side line of the 30-foot strip and northward of the apex shaft No. 2 to the point where the hanging crosses the west side line of the 30-foot strip. It might have been 60 feet northward of the 108-foot plane. We stoped between the 85 and the 40 foot as far east as the plane of the compromise line, and between the 40 and 18 or 20-foot level up to the surface. The stope was all the way from 3 to 6 feet, possibly 7 feet wide. We took out all the richest ore. The stulls in timbering average from 2 to 4 or 5 feet. It varies from three to seven feet, the cap would be full width of the level. I would not say that they were over $3\frac{1}{2}$ feet on the surface where you could notice them, because I never noticed it.

When I said in my direct examination that the $111,000 of ore yielded over $100 per ton per carload lots, I meant net after paying all costs, railroad fares, shipping costs, smelter charges, but not hauling from the mine to the railroad. The mining cost is about $1.50 a ton. We have paid as high as $2.00 or $3.00 per ton for mining. The best ore went $300.00 a ton, the worst about $50.00. It was all handled at the smelter or the Big Ox Mill. The report that you showed me is one that I made my company, and the 3260 dry tons of ore referred to in the report yielding gross $111,490.19 is

(Testimony of William Mayger.)

the same ore and the same product that I said yielded $111,000.00 in the direct examination.

Thereupon as a part of the cross-examination the portion of said report referring to said ore was read in evidence, said report bearing date January, 1901, as follows:

"We have mined and stoped from the Drumlummon vein 3,260 dry tons of ore at a cost of $6.00 per ton or a total of $19,560.00. We shipped 1300 tons of this ore to the smelters, for which we received, after paying freight and smelter charges, $64,539.87; the remaining 1960 tons was shipped to the Big Ox mill, from which we realized in retort and concentrates $46,950.32.

Recapitulation: Mining 3,260 dry tons of ore, $19,560; that is on the debit side.

On the credit side: Receipts from ore shipped smelter $64,539.87. Also on the credit side receipts of ore milled, Big Ox Mill, $46,490.19. The debit items are made up of the mining cost just stated, mining 3,260 dry tons of ore, $19,560. Excess of receipts above expenses $91,930.19."

Redirect.

On redirect examination the witness was interrogated and replied as follows:

Q. You testified on your direct examination about the course of your discovery vein as compared with the Drumlummon. I forgot to ask you about the map. I have had another map made since. I would like to do so now, as part of my direct. I will ask you to look at

(Testimony of William Mayger.)

that map (showing witness map) and see if the general course and the general situation is illustrated by it?

A. I think, generally speaking, it does, so far as I know anything about it.

Q. Do you know who prepared that map, or rather the little ones from which that is a copy?

A. No, sir, I do not.

Q. Do you know who prepared this one (showing witness a small map)?

A. No, sir, I do not know who prepared it.

Q. I will ask you whether that is a fair illustration so far as you know it. Here is the little one I think you have seen before. One is a copy of the other.

A. I think it is a fair enough illustration. The discovery vein there, according to my idea, there is not so much of a throw on the fault line the two ends ought to be nearer together here, and this line out here (indicating) ought to be a little bit higher up toward that point, otherwise it is all right.

Whereupon plaintiff offered the said map in evidence.

To which the defendant then and there objected for the reason that it contradicted the map that had already by stipulation been attached to the complaint in the action, in that it showed the departing foot-wall to be at a point southerly of the 133-foot plane and carried the foot-wall out through both of the end lines of the claim. Also for the reason that there is no testimony showing when, by whom, or for what purpose the

(Testimony of William Mayger.)

map was made, and that it was a contradiction so far as the course of the discovery vein was concerned, of the map introduced in evidence and marked Plaintiff's Exhibit No. 1. It also contradicted the testimony of the witness on the stand in that it showed the departure of the hanging-wall of the vein at a point 240 feet northward of the 520-foot plane.

By the COURT.—I think that paper may be used as illustrative of the testimony of the witness.

To which ruling of the Court counsel for the defendant excepted.

(The paper was marked Plaintiff's Exhibit No. 3.)

By the COURT.—Do I understand that you offer it formally in evidence?

Senator BROWN.—I do not claim that this map is correct at all, I never have claimed it, but I think it illustrates this case. That is the reason I wanted to put it in, and the jury may consider it for what it is worth. If there is no objection I should like to ask the jury to have copies of it.

By Mr. WALLACE.—Our objection goes to the entire use of the map as evidence. (Blue print copies of the map were handed to the jury. Counsel for defendant excepts.)

And referring to another map appearing on the flyleaf of a report of the St. Louis Mining Company, the witness was asked the following question:

(Testimony of William Mayger.)

Q. I will ask you if that bears a general resemblance to the general situation of the Drumlummon mining claim to the rest of the property?

To which question the defendant objected for the reason that the same is leading.

But the Court overruled such objection and permitted the witness to answer said question.

To which ruling of the Court the defendant then and there duly excepted.

The witness answered:

A. That would be correct if the discovery shaft of the Drumlummon was set a few hundred feet further to the north.

Plaintiff also called and had sworn as a witness in its behalf, one Walter Proctor Jenny, who testified substantially as follows:

## WALTER PROCTOR JENNEY.

I am consulting geologist and mining engineer. I was educated in the Columbia School of Mines. I have examined the discovery vein of the St. Louis Lode Mining Claim. Its course is substantially northeast and southwest. I believe that the discovery vein extends the full length of the claim from end line to end line. Explorations under ground shows that it lies within 750 feet of the north end line, and in the south end it is tracted to within 95 feet of the end line. I find an outcrop within 150 feet of the north end line which I believe to be the

(Testimony of Walter Proctor Jenney.)

outcrop of this discovery vein. The dip of the vein is easterly from 70 to 85 degrees.

I know the Drumlummon vein; it enters the St. Louis claim at the 520-foot plane as shown on the map. And from that point to the 108-foot plane, it is entirely within the St. Louis surface. The width of the vein from the hanging to the foot-wall is not uniform, at one point it is only 4 feet and 8 inches, while the greatest distance I find the walls apart is approximately 45 or 46 feet. The material between the walls is crushed and fractured country rock. In some places converted into quartz and mineralized, and at still other places there is ore of sufficient value to work and ship. At the 108-foot plane, the hanging-wall passes into the compromise ground, and between that point and the 333-foot plane there is, going westward from the hanging-wall, 7 feet of quartz which has been stoped and removed. There is next this going west, about 8 feet of quartz. A good part of it is still standing. The width of the vein measured along the 108-foot plane, but not at right angles to the vein is 55 feet. The vein crosses two porphyry dikes and faults both of them. There is a geological difference between the St. Louis discovery vein and the Drumlummon vein. The strike of the veins are very different. The discovery vein is nearly north 45° to 50° east magnetic, while the general course of the Drumlummon in the ground in dispute is about north 10° east. Then the dip of the St. Louis vein is much more vertical than that of the

(Testimony of Walter Proctor Jenney.)

Drumlummon vein. The discovery vein of the St. Louis is broken up. There is a cross faulting, notably on the Transcontinental level, where the faulting on the tunnel level is 90 feet.

Cross-examination.

I first visited the St. Louis property in July, 1899, and spent 29 days on the ground before the previous trial. I spent about three days, but not all of each day on the discovery vein of the St. Louis. The vein is in granite. The trend of the ore chutes are to the south. I gained entrance to the works through the Transcontinental tunnel. I never went down the discovery shaft. The dip of the fissure in the Transcontinental tunnel varies from vertical to westerly at about 15° from the vertical. The direction or strike of the discovery vein is from 45° east magnetic to north 55° east. North 45° east magnetic would be north 65° east true. I first went through the east cross-cut run from the bottom of the 65-foot shaft over to the east side line of the St. Louis and slightly beyond. The Drumlummon vein is very nicely exposed at the end of the cross-cut. The walls at that point are in slate. I observed the dip of the discovery vein, it ran from 70° to 85° sometimes. I do not remember any of the points at which I took the dip. The foot and hanging-wall of the Drumlummon are both disclosed in the drift northerly from the bottom of the 65-foot shaft.

North of the 65-foot shaft and on about the same

(Testimony of Walter Proctor Jenney.)

course as that followed by the vein between the Transcontinental tunnel and the bottom of the 65-foot shaft, a level has been run on the discovery vein for quite a distance, most of it in granite with about 25 feet at the extreme northerly in the slates. The vein seemed to be pinched there. I think the length of the drift on the vein north of the bottom of the 65-foot level is about 100 feet.

There is a strong talc seam on the hanging-wall of the Drumlummon, which shows very distinctly at the entrance of the 85-foot level in cut 14. The width of the vein at this point is about 11 feet between the walls. The slate is quite well marked there in places. There is a talc seam on the hanging-wall which is 18 to 20 inches wide. Probably in no place more than 2 feet wide. It contains finely ground material, clay and talc mineralized with it, some quartz but not much. The vein is poorly mineralized there. The general strike of the vein between the 520 and the 108-foot planes is about north 10° east magnetic. North 30° east true. If the 85-foot level had been driven entirely on the hanging-wall side, the finely ground matter and so on would show to the right of the level as an apparent foot-wall. It is a companion wall to the hanging-wall and would seem like a foot-wall to a miner. It would be strong enough to timber against. The seam on the hanging-wall is a fissure, and if it contains ore at points, a miner would follow it, taking out all of the valuable

(Testimony of Walter Proctor Jenney.)

ore in the vein. They are apt to be sympathetic fissures in slates running more or less parallel with the fissure of the vein containing ore. Going into the 85-foot level, the first cross-cut you encounter is at point 4. There is some quartz at point 4 on both the right and left-hand side of the level. There is more or less mineralized quartz entirely across the vein at this point. Looking overhead at this point, you see the fissure continuing right through it clearly marked, which indicates that the Drumlummon fissure is younger in point of time than the cross-fissure, as the older veins are cut by the more recent ones. Where there is a cross-fissure of this character we generally expect to find greater mineralization because at such a point opportunity is afforded for a freer circulation of the mineralized solutions and gases.

Going southerly from point 4 there is another fissure near apex shaft No. 1. It comes in from the northeast. Going through this fissure, the course of the Drumlummon vein is clearly marked and the course of this vein is marked throughout the level as far as it can be traced on account of stopes. At the extreme southerly point of this level, the country is a good deal disturbed by cross-fissures.

On the surface the 108-foot plane lies about 5 feet northerly of the sides of the two apex shafts which are located together at that point. The ore practically comes to the surface at that point. In taking out this ore, the stulls or caps used by the miner would be as

(Testimony of Walter Proctor Jenney.)

long as the ore body was wide, but the ore body may not fill the space taken out and occupied by the timbers. There is a little cut at the point where the 133-foot plane intersects the compromise line. The point is caved in and if cleaned out, it would not show the quartz coming up there. The point is about 8 feet distant from the edge of the caving that shows the stoping.

Plaintiff also called and had sworn as witnesses in its behalf, James E. Jackson, Alexander Swan and Frank J. Leedy, who testified substantially as follows, to wit:

That they were quartz miners; that they had in company with each other and with Mr. William Mayger, plaintiff's manager, visited the premises in controversy on the 30th day of May. That they had started at corner No. 2 of the St. Louis claim, and with a tape line had measured northward to a point 63 feet northerly from said point of commencement; that they had then measured southerly along what was pointed out to them as the west line of the 30-foot strip for a distance of 133 feet. That at said point a small trench was dug, probably two feet in length and 6 inches wide, which extended down to the solid formation, from which they took some samples, which they would term vein matter. That at said point no wall was disclosed. That they then went to the 20-foot level, which they followed to the apex shaft and came out at the surface at that point. That there was disclosed in that level lead matter all the way, from which they took several samples that they considered vein matter. That through that level there

(Testimony of Walter Proctor Jenney.)

was no sign of a hanging-wall. They then went down into the 40-foot level, noting that the ground above them had been stoped and that the stopes were about 7 feet wide. That they then went down the winze to the 85-foot level. That on said level, ore had been stoped out clean to the brattice, that is at the end of the level. On the north side of the brattice, they measured from the foot to the hanging-wall and found the distance to be 17 feet. That northerly 85 feet from the brattice there was a cross-cut where the width of the vein was again measured and found to be 21 feet. The material between the points being vein matter.

The plaintiff also called and had sworn in its behalf one Joseph W. Wallish, who testified substantially as follows:

JOSEPH W. WALLISH.

I am acquainted with the plaintiff and have known it since 1885. I know where the ground in controversy in this case is located. I have heard the testimony of Mr. Parks and heard him speak of taking certain samples. I was present when those samples were taken. The first sample was taken in the Montana company's apex shaft, it was taken from the northeasterly portion of the shaft. We spread a small canvas down on the floor and Professor Parks took his pole pick and ran it across the solid matter there. Then the portion that fell down was divided into two sacks, and Professor Parks handed the delegation of the Montana company one of them.

(Testimony of Joseph W. Wallish.)

There were present, Professor Parks, William Jenkins and myself representing the St. Louis company, and on the part of the Montana company there was William Philpotts, Mr. Thomas Lahiff, Mr. Bob Matthews and Mr. Dave Heron. The same method was followed in the entire sampling; that is, so far as the disposition of the samples taken was concerned.

Cross-examination.

I took care of the samples. It took one day to do the sampling. The first sample was taken 12 or 15 feet down the Montana company's apex shaft from the surface. The next one was taken between 40 and 55 feet, it was also taken from the north side of the shaft. The third sample was taken about 10 feet further down, or in other words about 65 or 70 feet from the surface. It was taken on the north side in the cribbed shaft. The fourth sample was taken about the center of the cribbed shaft. Professor Parks was the only one in the main portion of the shaft, the balance of us later on went down the man-way, and we could look into the main shaft and saw him operating. This sample was taken probably 85 to 90 feet from the top of the cribbed shaft. The fifth sample was taken about 12 feet or 15 feet from the bottom of the cribbed shaft, which would be about 115 or 120 feet, something like that, from the surface. The next place that a sample was taken was in the 85-foot level. We had gone up their raise. A canvas was spread down at the breast of the 85-foot level and sam-

(Testimony of Joseph W. Wallish.)

ples taken. There was a portion of two ore sacks divided up between us, one to us and one to them. They were larger than the usual size.

The plaintiff recalled John R. Parks, who testified substantially as follows:

JOHN R. PARKS.

The discovery vein of the St. Louis is a gold-bearing fissure vein running in the general direction of the side lines. The vein is developed both northerly and southerly from the Transcontinental tunnel. There are levels running on the vein about 250 feet below the Transcontinental tunnel. It has a dip of about 80° to the east. The Transcontinental tunnel follows a fissure, and there is a fault of the lode caused by that fissure which causes a throw of the vein of about 95 feet.

The Drumlummon vein crosses the east boundary of the St. Louis at the 520 plane. I cannot place the footwall at the present; it is not shown on the map, and I have forgotten the exact point. I believe the cut developed it, but I cannot recollect the exact point. Going southerly along the 85-foot level we are just under the hanging-wall of the Drumlummon and in the bratticed vein matter until we come to cut No. 14. At cut No. 14 we have a section across the whole vein which can readily be determined on the hill. The walls of the Drumlummon go down at an angle of about 60°. There is a cross-cut at point 4 on the 85-foot level showing the

(Testimony of John R. Parks.)

vein at that point to be about 21 feet wide. The hanging-wall departs at the 108-foot plane from the St. Louis ground and into the compromise ground.

Whereupon the witness was asked the following question:

Q. Have you done anything in the way of measuring up what was taken out by the Montana company?

Whereupon the defendant objected to any testimony relative to ores extracted between the 108 and the 133-foot planes. Defendant argued in support of its objection that between said points the plaintiff did not have the entire apex, that if granted extralateral rights between said points, it would be taking the ore from the vein on its strike and beyond the vertical side line of the plaintiff's ground, and for the reason that it would take about 186 square feet of the surface of defendant's claim.

But the Court overruled said objection and permitted the witness to answer said question.

To which ruling of the Court the defendant then and there duly excepted.

A. I have, Mr. Keerly and myself made a careful survey of the ground and accurately measured all of the stopes and cavities from which ore had been removed. I sampled carefully in the presence of people appointed by the Montana company to go with me. I took samples of all these stopes. After taking the samples I tendered to them a choice of either portion, and they were received by them. I have assayed those samples care-

(Testimony of John R. Parks.)

fully in duplicate and I have determined the specific gravity of the mineral removed by taking specimens of that removed at the nearest point; a great number of specimens, calculated the number of tons, the number of cubic feet it takes to make a ton, and from the tonnage and the values I have determined with a considerable degree of accuracy, as correctly as can be determined, the tonnage and the value of the ore extracted. I arrived at the value by samples of ore taken at the nearest points to the cavities stoped out, knowing that the ore originally followed these cavities, and assaying the samples. I calculated the value of the gold at twenty dollars an ounce, which is the rate paid by the smelters, the true value being $2.67 as paid by the Government, and I took the value for the silver at sixty cents an ounce, which was the average price of silver during that time. In making the survey I was obliged to make an arbitrary division of some of the stopes for the reason that we could not determine how much of the ground we would be allowed to show damages for, and consequently in some of the stoped ground I passed an imaginary plane through the stopes, the 108-foot plane, and then divided the balance up with reference to the east and the west side lines of the compromise ground. I called the results of this arbitrary division blocks, which are numbered as we happened to survey and block them out.

We followed the plans as far south as the 133-foot

(Testimony of John R. Parks.)

plane and to the depth of the 190-foot level in defendant's ground. I divided the ground into eleven blocks.

Whereupon the witness was required to take the blocks and tell the tonnage and value he found in each block.

To which said question the defendant objected for the reason that it included blocks in the compromise ground which by the judgment in the specific performance case was found to be the property of the defendant, together with all of the mineral therein contained. And because they are not within the recovery period under the pleadings in this action, in that a portion thereof at least is taken out since September 16th, 1893. Defendant also specially objected to all proof of quantities and values of any and all ores in each block respectively lying between the 108 and 133-foot planes and south of the Montana company's apex shaft, because no recovery for any ore there extracted is permissible under the pleadings in this case.

But the Court overruled each and every such objection and permitted the witness to answer said questions.

To which respective rulings of the Court the defendant then and there duly excepted.

The witness answered:

A. I have a block No. 1, the stope south of the north line of the Montana company's apex shaft, to the 133-foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the compromise ground extended downward vertically. The block has

(Testimony of John R. Parks.)

an average width of 7 feet, is 21 feet long and 36 feet high, giving a volume of 5333.1 cubic feet, or 410½ tons. The average value of this ore was $145.00 per ton, or a total of $59,522.50.

Block number 2 is the stope between the instrument at K. and the spud at J. J was 13.5 feet vertically below K. It is from the north side of the Montana company's apex shaft south to the 133-foot plane. The average width of the block is 5.4 feet, its height is 3½ feet, and its length 21 feet, giving a cubical contents of 1814.4 cubic feet. Dividing that by 13, the number of cubic feet to the ton, we have 139.6 tons. The value of the ore as sampled on the north side of this block was $146.42 per ton, which gives the value of the ore removed $20,440.23.

The next block, number 3, is the ore removed between stations J to the floor at H between the 108 and the 133-foot planes, and east of the west of the side line of the 30-foot strip. The height is 66.9 feet, the ground removed is 5x7 feet, which gives 2341½ cubic feet or 180.1 tons. The value of the ore from the side of the shaft throughout this distance is $203.88 per ton, making a total value of the ore removed $36,718.78.

Block number 4 is the stope above the 20-foot level, east of the west line of the 30-foot strip. It is south of the 108-foot plane and north of the Montana company's apex shaft.

By agreement of counsel the objections interposed and the exception taken with reference to block one was to

(Testimony of John R. Parks.)

extend to blocks two and three and all subsequent blocks in the Compromise ground.

Block 4 is 6 feet wide, 14 feet high, and 6 feet long. It contains 514 cubic feet, or 38.8 tons. A sample of the ore was taken from the shaft, which gave $165.10 per ton, making a value of $6,405.88.

Block 5 is a stope along the 190-foot level, between the 108 and the 133-foot planes east of the west line of the 30-foot strip. It has an average width of 8.4 feet wide, is 8 feet high, and 36 feet long, giving a cubical contents of 2419.2 cubic feet or 186.1 tons. The value of the ore was $127.14. Total value of the ore removed was $23,660.75.

Block 6 is a triangular stope above the 190-foot level between the 108 and the 133-foot planes and east of the west side line of the strip. The length of the stope is 26 feet, average height, 71 feet, average width stoped out, 8 feet. It has a cubical contents of 7753.2 cubic feet or 596.4 tons. The value at $127.14 per ton is $75,826.30.

Block 7 is a little stope which connects the main stope of the 190-foot level with the 40-foot level between the 108 and the 133-foot planes, and east of the west side line of the 30-foot strip. It has an average width of 8.4 feet. Its cubical contents is 2356.2 feet or 181.2 tons, at a value of 127.14; total value of the ore removed is $23,037.77.

Block 8 is the ground stoped out by the Montana company at the south end of the St. Louis' 85-foot level. It is outlined on the map and lies east of the west side line

(Testimony of John R. Parks.)

of the compromise strip, and north of the 108-foot plane. This is the ore that was stoped by injunction. The average height of this stope is 15.3 feet, the average width is 6.5 feet, the average height is 22 feet. It contains 2187.9 cubic feet, or 168.3 tons. The value of the ore is $13.28 per ton, total value of the ore removed, $2,235.02. I have excluded a portion of this block as the ore was too low grade.

Block 9 is the stope above the 20-foot level and north of the 108-foot plane. That stope was 6 feet wide, 14 feet high, and 9.5 feet long. It contains 798 cubic feet or 61.4 tons. It has a value of 165.10 per ton, same as block number 4, of a total value of $10,137.14.

Block 10 is on the 190-foot level north of the 108-foot plane. That block has a width of 8 feet and a length of 35 feet and a height of 8 feet. It contains 1904 cubic feet, or 146.5 tons. The value of the ore is $127.14 per ton; giving a gross value of $18,626.01.

I find the total number of cubic feet mined is 27,414.5 or 2118.9 tons, the total value of which is $276,610.38.

Cross-examination.

I took samples from the north side of the Montana company's apex shaft, and I combined the samples from four different points. The shaft is about five feet by seven feet, the long way being northerly and southerly. The samples were taken between the lagging and the shaft, except for block 8; in that case a wagon sheet was spread down and a sample was taken from the top of the

(Testimony of John R. Parks.)

block and from its sides. The sample I took in block 2 assayed $146.42. I took it by reaching in between the lagging. My samples for blocks 5, 6, 7 and 10 combined samples taken from the north side of the Montana company's apex shaft. The combined sample averaged $127.14. I took no sample nor made any assay from blocks 5, 6, 7 and 10 for the reason that the ore had been stoped out of the blocks, when my samples were taken. These four blocks, 5, 6, 7 and 10, I estimated to be of the value of $141,150.83. In making my average, I took the value of block 1, $145,00; block 2, $146.42; block 3, $203.-88; block 8 $13.28.

Redirect.

There is a block of ground between the 108 and 133-foot planes and above the 190-foot level that is not included in the stopes or blocks which I surveyed and about which I have testified. The superficial area of such block is 1855½ square feet. Assuming that the ground contained an ore body of an average thickness of 7.29 feet the cubical contents of that ore would be 13,526.63 cubic feet.

Q. And how many tons at 13 per ton?

By Mr. WALLACE.—What is the purpose of that?

By Mr. BROWN.—We want to show what is in it. It might not be redirect, but I want to put it in any way. It was brought out by them.

By Mr. WALLACE.—We object to the question, first: Because it assumes a fact not in evidence, that the area

(Testimony of John R. Parks.)

in question contained ore. Second, on the ground that it is immaterial and irrelevant in that the tonnage of this area can cut no figure, since there is no place that embraces any part of stoped territory.

Objection overruled.

Defendant excepts.

A. This would represent 1040.51 tons, taking 13 cubic feet for a ton. Calculating the value of the ore at $127.14, the ore body would have a value of $132,290.44. The average thickness measured horizontally of the ore bodies in the surrounding blocks is 7.29 feet.

Thereupon the plaintiff offered in evidence the original location notice of the St. Louis claim, which was admitted and is as follows, to wit:

DECLARATORY STATEMENT OF DISCOVERY OF AND CLAIM TO QUARTZ LODE MINING CLAIM.

St. Louis Lode Mining Claim, Ottawa Mining (Claim) District, Lewis and Clarke County, Montana Territory:

The undersigned, who is a citizen of the United States, hereby declares and gives notice to all persons concerned, that he has discovered a vein or lode within the limits of the claim hereby located, and that he has this 28th day of September, A. D. 1878, located and do hereby locate and claim under and by virtue of the laws of the United States and of the Territory of Montana, a mining claim upon said lode or vein to be designated and named the St. Louis Quartz Lode Mining Claim, extending along said vein or lode eight hundred feet in a northeasterly

direction, and seven hundred feet in a southwesterly direction, from the center of discovery shaft, where a similar notice is posted, and three hundred feet on each side from the middle or center of the said lode or vein at the surface, comprising in all fifteen hundred feet in length along said lode or vein, and six hundred feet in width, with all the rights and privileges as to surface ground and lode veins, or lodes within the boundaries of said claim and otherwise and the metals, minerals, and valuable deposits of every kind contained in said veins, lodes or ledges, or within said boundaries which are given or allowed by the laws of the United States aforesaid or of the Territory of Montana.

The mining claim hereby located is situated in Ottawa mining district, Lewis and Clarke County, Montana Territory. Said discovery shaft is about 900 feet in a southwesterly direction from a point of rocks rising about 15 feet above ground and upon the southwestern portion of the Drumlummon mining claim, and about 1,500 feet easterly of Ottawa Gulch in above written county and territory. The adjoining claim is the Drumlummon on the northeast. This location is distinctly marked on the ground so that its boundaries can be readily tracted by a stake set at discovery shaft this 28th day of September, A. D. 1878. And by substantial posts at each corner of the claim and the exterior boundaries of the claim as marked by said posts are as follows, to wit:

Beginning at a post set at discovery shaft, marked A, thence running in a northeasterly direction eight hun-

dred feet to a post marked B, thence northwesterly 300 feet to a post marked D, thence southwesterly 1,500 feet to a post marked E, thence southeasterly three hundred feet to a post marked F, thence same course three hundred feet to a post marked G, thence northeasterly 1,500 feet to a post marked C, thence three hundred feet northwesterly to post B. The undersigned intend to hold this claim under and according to the laws of the United States and of the Territory of Montana, and to record this notice and statement under oath in the County Recorder's office of said county, as provided by law. Dated this twenty-eighth day of September A. D. 1878.

CHARLES MAYGER. [Seal.]

Territory of Montana,
Deer Lodge County. } ss.

The undersigned being first duly sworn on oath says that he is of lawful age, a citizen of the United States; that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated and that the matters in the foregoing notice contained are true of his own knowledge.

CHARLES MAYGER.

Subscribed and sworn to before me on this, the 10th day of October, A. D. 1878.

J. B. WILCOX,
Justice of the Peace.

Filed for record, October 12, 1878, at 9 o'clk, A. M.

O. B. TOTTEN,

County Recorder.

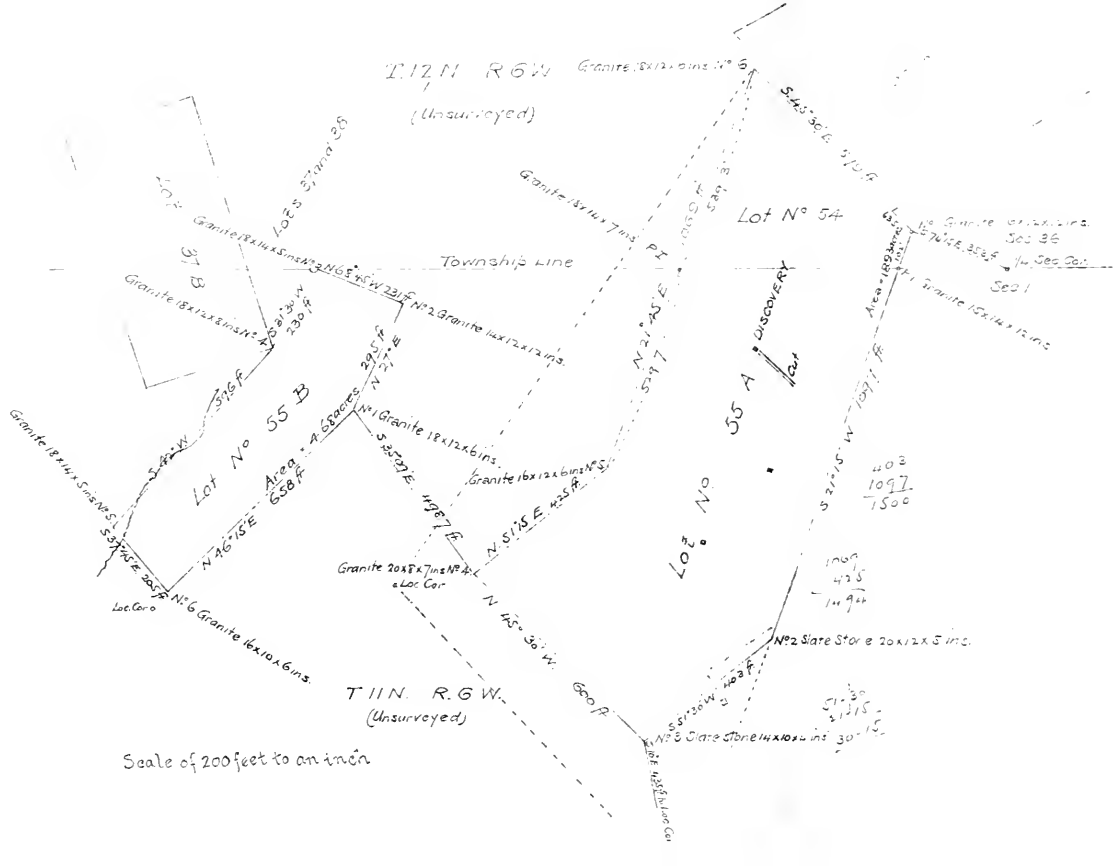
ST. LOUIS PATENT.

The plaintiff thereupon offered in evidence its patent for the St. Louis Mining Claim, which was received in evidence, and marked as an exhibit, said patent is dated on the 22d day of July, 1887, and conveys the said St. Louis claim to plaintiff's grantor, Charles Mayger, describing the said claim by metes and bounds as in the complaint herein, which patent, among other things, contains the following proviso, to wit:

"Provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lots Nos. 54 and 55 A, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; and, provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another."

Whereupon it is ordered by the Court that the patent itself be ordered attached to this bill of exceptions and sent up to the Circuit Court of Appeals as part of this record, in accordance with the rules of court.

The said patent was dated on the 22d day of July, 1887, and contained the diagram of the St. Louis Lode Mining Claim as therein conveyed, which said diagram is herein reproduced as follows:


T 12 N R 6 W
(Unsurveyed)
Granite 18x12x6 ins. No 5
S 45° 30' E 570 ft
Granite 18x14x7 ins. Pt
Lot N° 54
Lot N° 55 A
DISCOVERY
Area = 189 acres
Granite 15x14x12 ins.
Sec 36
1/4 Sec. Cor.
Sec 1
Granite 18x14x5 ins. No 4
N 65° 45' W 331 ft
No 2 Granite 14x12x12 ins.
Township Line
Granite 18x12x8 ins. No 3
Lot N° 55 B
Area = 4.68 acres
6568 ft
No 1 Granite 18x12x6 ins.
Granite 16x12x6 ins. No 5
N 21° 45' E 597 ft
N 51° 15' E 425 ft
N 46° 15' E
S 51° 15' E 201 ft
Loc. Cor. o
No 6 Granite 16x10x6 ins.
Granite 20x8x7 ins. No 4
& Loc. Cor.
N 45° 30' W 600 ft
T 11 N. R. 6 W.
(Unsurveyed)
No 2 Slate Stone 20x12x5 ins.
No 3 Slate Stone 14x10x4 ins.
Scale of 200 feet to an inch

## JUDGMENT-ROLL IN SPECIFIC PERFORMANCE CASE.

The plaintiff then read in evidence the complaint, the answer, the replication, the findings of fact and conclusions of law and the judgment rendered in the case of the Montana Mining Company, Limited, vs. The St. Louis Mining and Milling Company of Montana, as the same appeared of record in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis and Clarke, and commonly known as the Specific Performance case. Said documents, omitting captions and titles, are as follows, to wit:

*In the District Court of the First Judicial District of the State of Montana, Within and for the County of Lewis and Clarke.*

MONTANA MINING COMPANY, LIMITED,
Plaintiff,
vs.
CHARLES MAYGER and THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant.

**Complaint.**

The plaintiff complains of the above-named defendants and for cause of action alleges.

I.

That this plaintiff is an incorporation duly organized and existing by and under the laws of the Kingdom of Great Britain, and is doing and entitled to do business in the State of Montana by virtue of its compliance with the laws of this State regulating foreign corporations.

That the above-named defendant, the St. Louis Mining and Milling Company of Montana, is and was at the several dates hereinafter mentioned likewise an incorporation organized and existing by and under the laws of said State of Montana.

II.

And plaintiff further shows and alleges that on and prior to the 7th day of March A. D., 1884, plaintiff's predecessors in interest, to wit, one William Robinson, James Huggins and Frank P. Sterling, Warren DeCamp and John W. Eddy, who were then and there all citizens of the United States and duly qualified mineral land claimants, were the owners of, in possession of, and lawfully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground, comprising a portion of the Nine Hour Lode Mining Claim situate, lying and being in Ottawa (unorganized) Mining District, in the County of Lewis and Clarke, and State of Montana, more particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour Lode bears south 39 de-

grees 32 minutes east, said course being at right angles to the boundary line of the St. Louis Lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east, on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode Claim between corners one and two; thence 20 degrees and 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 408 feet to corner No. 3 of the St. Louis Lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis Lode Claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode Claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained; that theretofore in causing to be surveyed for a patent his St. Louis Lode Mining Claim, the above-named defendant Charles Mayger, had wrongfully extended, and caused to be extended, the easterly boundary line of his said mining claim over the premises so above-mentioned and particularly described, which said premises were then, and ever since the twenty-sixth day of July, 1880, have been, a part of the Nine Hour Lode Mining Claim, so that the property of the foresaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual possession and en-

titled to the possession thereof. And thereupon said defendant Charles Mayger, having wrongfully made application in the United States Land Office at Helena, Montana, to enter said premises as a part and portion of his said St. Louis Mining Claim, the said Robinson and Huggins duly made and filed in said land office a protest and adverse claim thereto, and thereafter and within the time allowed by law for such purpose, they commenced an action in the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis and Clarke, to determine the right to the possession of the said premises. In the said action so commenced as aforesaid, the said William Robinson and James Huggins were plaintiffs, and the above-named defendant, Charles Mayger, was defendant therein, and the said court had jurisdiction to determine the subject matter of said action; that thereupon, and on the seventh day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode Mining Claim and the said St. Louis Lode Mining Claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so that he might procure a United States patent, he thereby covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling,

or their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly mentioned and described, a copy of which said bond for a deed is hereunto annexed marked Exhibit "A" and hereby made a part of this complaint.

III.

And plaintiff further shows and states that thereupon the said Robinson and Huggins dismissed their said suit in said District Court, withdrew their said adverse claim in said land office, and duly performed on their part all of the terms and conditions of said contract to be by them kept and performed, that the said Charles Mayger thereupon proceeded with his application to enter said St. Louis Lode Mining Claim, and thereafter a United States patent was duly issued to him for said St. Louis Lode Mining Claim as surveyed, and included therein that portion of the Nine Hour Lode Mining Claim above particularly mentioned and described, but no notice was given to this plaintiff or any of its predecessors in interest of the issuance of said patent, until on or about the —— day of November, 1899. That upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors in interest ever since have been and yet are in the possession thereof, holding, using and enjoying the same as a part and portion of said Nine Hour Lode Mining Claim.

IV.

And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode Mining Claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode Mining Claim; that being so the owner of said mining claim, and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff, on or about the —— day of July, A. D. 1893, demanded of and from the said defendants that they make, execute and deliver a good and sufficient deed to it of and for the premises above mentioned and described in compliance with the terms and conditions of the said bond, no demand for the execution of said deed having been previously made by plaintiff or any of its predecessors in interest; but the said defendants then and there refused and ever since have neglected and refused, to make, execute or deliver said deed, though often requested so to do.

V.

And plaintiff further shows and states that not only has the said defendant, Charles Mayger, refused and declined to comply with the reasonable request of the plaintiff that he make and execute to it a deed for the said premises above particularly described, as in and by his said bond for a deed he covenanted and agreed to do, but on or about the tenth day of June, A. D. 1893, for an al-

leged consideration of one thousand dollars, he made, executed and delivered a deed of and for said premises to the said defendant, the St. Louis Mining and Milling Company of Montana, but plaintiff avers that at the date of the execution of said deed, the said defendant, the St. Louis Mining and Milling Company of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said codefendant and of the rights and equities of plaintiff thereunder as being the successors in interest of the said Robinson, Huggins, Sterling and its other grantors.

And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging and defrauding this plaintiff out of the said premises, and to that end the said defendant and the St. Louis Mining and Milling Company of Montana have instituted a number of suits in the Circuit Court of the United States within and for the District of Montana, in which it claims that it is the owner of the premises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed and delivered to it by its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrongfully mined from said premises by this plaintiff; that in order to successfully defend itself against said suits and in order to remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, the St. Louis Mining and Milling Company of Montana, it is necessary that the said defendants

should be compelled to make, execute and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do.

Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this Court the said defendants be adjudged and decreed to make, execute, and deliver to plaintiff a good and sufficient deed for the said premises above mentioned and described, and that in the event of their failure so to do the decree of this Honorable Court may have the force and effect of such deed; that plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs.

M. KIRKPATRICK and
CULLEN & TOOLE,
Plaintiff's Attorneys.

Duly verified by Jos. K. Toole, as attorney, on September 5th, 1894, before W. E. Cullen, Jr., notary public, Lewis and Clarke County, Montana.

**Exhibit "A."**

DEED—MAYGER TO ROBINSON ET AL.

Know all men by these presents, that I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with my seal and dated this 7th day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now pending in the District Court of the Third Judicial District, Lewis and Clarke County, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States Land Office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States Land Office at Helena, Montana, for a patent to the St. Louis Lode Claim described therein and situated in Lewis and Clarke County, Montana Territory, and procure as soon as practicable a government patent therefor, and when such title shall have been procured according to said application said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situated in Lewis & Clarke County, Montana Territory, and comprising a part of two certain quartz lode mining claims known as the

St. Louis Lode Claim and the Nine Hour Lode Claim, and particularly described as follows, to wit: Commencing at a point from which the center of the discovery shaft of the Nine Hour Lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis Lode, between corners 2 and 3, 50 feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the said St. Louis Lode Claim and the Nine Hour Lode Claim, and to a point on the boundary line of the St. Louis Lode, between corners 1 and 2; thence south 20 degrees 28 minutes east along said boundary line between corners 1 and 2, 605 feet to corner No. 2 of the St. Louis Lode, 40.031 feet to corner No. 3 of the St. Louis Lode; thence north 46 degrees 10 minutes west along the line of boundary of St. Louis Lode, between corners 3 and 4, 30 feet to a point; then north 50 degrees 28 minutes east along the line parallel to the boundary line of the St. Louis Lode, between corners 2 and 3, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained; and if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [Seal]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [Seal]

Witness:

J. K. TOOLE.

Duly acknowledged. Filed and recorded March 8th, 1884, at 3 A. M.

[Title of Court, Title of Cause.]

**Answer.**

And now come the defendants herein and for answer to the complaint of plaintiff:

I.

Admit that the said William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy were at the time mentioned in said complaint citizens of the United States and duly qualified mineral claimants, but on their information and belief deny that they were or are the predecessors in interest of said plaintiff, or that they were the owners or possessors of the piece, tract or parcel of land in said complaint described, or in the possession or entitled to the possession thereof, or any mineral therein then or at any other time, or that the same was or is a part of the Nine Hour Lode Claim, and aver that the same was and is a part of the St. Louis Lode Mining Claim, designated and known as such, and embraced and included in the United States patent obtained by the said defendant, Charles Mayger, for said St. Louis Lode Mining Claim, as hereinafter set forth.

Deny that defendant, Charles Mayger, wrongfully or otherwise extended or caused to be extended the easterly boundary line of said St. Louis Mining Claim, over the said described premises or any part thereof, but admit that he caused a survey to be made of the same, and aver that the boundary lines of said St. Louis Mining Claim as originally located included and embraced the said locus in quo and every part thereof at and prior to the location of said Nine Hour Lode Claim, and that the said Charles Mayger and his successors in interest hath ever since been, and now are, in the possession of the same and entitled thereto, save and except a small strip thereof occupied by a portion of the ore-house of plaintiff by sufferance of defendants.

And on their information and belief deny that said Charles Mayger wrongfully made application in the United States Land Office to enter said premises, and aver that the same was and at all times had been a part and portion of the said St. Louis Mining Claim.

Admit that the adverse claim of Robinson and Huggins was interposed to said application, and that they instituted an action, as in said complaint mentioned, and that said agreement was entered into, but deny that it was for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode Mining Claim and said St. Louis Lode Mining Claim, and aver that the same was executed to the said Robinson, Huggins and Sterling as a compromise on account of their adverse claim and suit aforesaid, and comprised a part of said St. Louis Lode Claim owned and possessed by the said Charles Mayger,

and to enable him to obtain a patent for the whole thereof according to said survey, and agreed to convey the same as in said bond set forth.

Defendants admit that by the terms of said bond the said Charles Mayger agreed, after obtaining a patent therefor, on demand of said Robinson, Huggins and Sterling, to make to them, their heirs or assigns, a good and sufficient deed for the premises in said complaint described, and on their information and belief aver that said plaintiff never has acquired or succeeded to the right, title or interest of said Robinson, Huggins or Sterling to said premises or any thereof, by conveyance or otherwise.

Deny that said Exhibit "A," as set forth, is a copy of the said bond, in that it obligates the said Charles Mayger to make a good and sufficient deed to said Robinson alone, and avers the fact to be the said original bond obligated said Charles Mayger to execute a deed on demand to the said Robinson, Huggins and Sterling, their heirs or assigns, as expressly set forth and alleged in said complaint.

II.

Admit that the said Charles Mayger obtained a patent for said St. Louis Lode Mining Claim, but deny that it contained any portion of said Nine Hour Lode Mining Claim, and aver that the said plaintiff and predecessors in interest had full knowledge and notice of the issuance of said patent mentioned, and were well aware and apprised thereof at or about the date of the issuance of the same.

Deny that at the time of the execution of the said bond, or at any other time, the said plaintiff or its predecessors in interest were, or ever have been, in possession of said premises, or any part thereof, except the small portion aforesaid, or that they or either of them used or enjoyed the same, or any part except the small part aforesaid, or that they ever had, held or enjoyed any part thereof as a part of said Nine Hour Lode Mining Claim.

III.

Admit that the said plaintiff, by mesne conveyances, acquired the title to said Nine Hour Lode Mining Claim, but deny that the said conveyances or any conveyances to plaintiff embraced or included the premises in said complaint mentioned and described, or any part or portion thereof.

Admit that the said plaintiff demanded of defendants a deed to said premises, as set forth in said complaint, but deny that no demand therefor was ever theretofore made, and aver the facts to be as hereinafter stated.

IV.

Deny that the said defendants, or either of them, had any knowledge or notice that the said plaintiff was the successor in interest of said Robinson, Huggins and Sterling, or either of them at the time of the making of the deed by the said defendant Mayger to his said codefendant, and on their information and belief deny that the said plaintiff is the successor in interest of said Robinson, Huggins and Sterling, or either of them, in

said premises so embraced in said Mayger's survey and patent, or any part thereof.

Deny that defendants have combined or confederated together for the purpose of cheating, wronging, or defrauding plaintiff out of its right or title to said premises or any part thereof, and aver, as heretofore, that the plaintiff has not and never had any right or title to said premises, or any part thereof, as successor in interest to any one whomsoever.

Deny that the claim of defendants, or either of them, casts any cloud upon any title of plaintiff, or that it is necessary they, or either of them, should execute a deed to plaintiff for said premises, or any part thereof, to satisfy the requirements of equity, or for any other cause or reason, and aver that if the said conveyances to plaintiff for said Nine Hour Lode Mining Claim included said premises as alleged, no such transfer or conveyance is necessary for any purpose.

And these defendants, for further answer to the complaint of plaintiff, show unto this Honorable Court that the said adverse claim aforesaid was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to said St. Louis Mining Claim, and that the said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience, and for the sole purpose aforesaid.

That on the twenty-second day of July, 1887, the said Charles Mayger, grantor of his codefendant, obtained and procured a United States patent for the premises described in his complaint as a part and portion of his

St. Louis Mining Claim in accordance with his possession and the survey had thereof, on account of which he acquired the legal title thereto, and had and held the possession thereof.

That the said defendant, the St. Louis Mining and Milling Company of Montana, ascertaining and learning that the said conveyances to said plaintiff did not comprise the said premises described in plaintiff's complaint, and that it had and held no title thereto, and for the purposes of better securing the possessory title by it had and held, obtained and received the deed from said Charles Mayger mentioned and described in plaintiff's complaint.

And these defendants, for further answer to the complaint of the plaintiff, and in pursuance of section 105, Code of Civil Procedure, Compiled Statutes of Montana, allege generally that the cause of action set forth in plaintiff's complaint is barred by the provisions of sections 29, 30, 31 and 32, subsec. 2, section 41 and section 47 of said Code of Civil Procedure, and had been so barred at the time of the execution of said deed to said defendant company.

Wherefore, defendants pray this Honorable Court that if it shall appear the said plaintiff is not the owner of said premises by any of the conveyances mentioned in the said complaint, or the title by it so pleaded, that the same be decreed null and void, and that the right, title and claim of defendant company be decreed superior to the claim of plaintiff in the premises in controversy; that such other and further relief may be had

as in equity and good conscience they or either of them may seem entitled, and that they receive their costs and disbursements in this behalf expended.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Duly verified.

Filed January 2, 1895.

[Title of Court. Title of Cause.]

**Replication.**

Now comes the plaintiff, and replying to the new matter in the answer of defendants filed herein:

I. Denies that the premises particularly mentioned and described in the complaint herein are or ever were any part of the St. Louis Mining Claim in any other way or manner or at all, except that the same were by the agreement aforesaid to be embraced in the application of the said Charles Mayger for a patent, as in the complaint herein mentioned and set forth.

II. Denies that the boundary lines of the St. Louis Mining Claim as originally located included or embraced the locus in quo or any part or portion thereof, and denies that the said Charles Mayger or his successors in interest are now or have ever been in the possession of the same or entitled thereto or any part or portion thereof.

III. Denies that the said original bond obligated the said Charles Mayger to execute a deed on demand to the

said Robinson, Huggins and Sterling, but, on the contrary, avers that the copy of said bond attached to the complaint herein is a true copy thereof.

IV. Denies that the said adverse claim mentioned in the complaint herein was interposed for the purpose of harassing or delaying the said Mayger from obtaining a patent to his said St. Louis Lode Mining Claim, and denies that there was anything in or about the execution and delivery of the said bond contrary to equity or good conscience.

V. Plaintiff denies that the said defendant, the St. Louis Mining and Milling Company of Montana, ever had or held a possessory title to the premises in the complaint herein particularly mentioned and described, or that it obtained or received a deed from said Charles Mayger for the better securing of any such title.

VI. Denies that the cause of action set forth in plaintiff's complaint is barred by the provisions of secs. 29, 30, 31 and 32, subsec. 2, sec. 41 and sec. 47 of the Code of Civil Procedure of the State of Montana, or any or either thereof or at all.

Wherefore plaintiff prays judgment as in its complaint herein.

M. KIRKPATRICK,
CULLEN & TOOLE,
Attorneys for Plaintiff.

Duly verified.

**Findings of Fact by the Court.**

I.

That the plaintiff and the defendant, the St. Louis Mining and Milling Company of Montana, are and each of them were, at the date of the commencement of this action, corporations doing business in the State of Montana.

II.

That on the seventh day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren DeCamp and John W. Eddy were the owners of, in possession and entitled to the possession of all and singular the Nine Hour Lode Mining Claim, situate, lying and being in the Ottawa (unorganized) Mining District, in the county of Lewis & Clarke, State of Montana, and that the strip of ground called the "compromise ground" which is the subject of dispute in this action, was, at that time, and thereafter continued to be, a part of said Nine Hour Lode Mining Claim.

III.

That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States Land Office at Helena, Montana, for a patent to the said St. Louis Lode Mining Claim, and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and Huggins had made and filed in the said land office a protest and adverse claim to the ground

in dispute, and an action had been instituted within the statutory time to determine the right to the possession of said premises in dispute, and as to who had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the District Court of the Third Judicial District of Montana, within and for the County of Lewis & Clarke; that on the said seventh day of March, A. D. 1884; the said Robinson, Huggins and Sterling and the defendant, Charles F. Mayger, entered into the bond or obligation attached to the complaint herein, marked exhibit "A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim owned by the said Mayger, the boundaries of which claims were in conflict aforesaid.

IV.

That thereupon said suit was dismissed and the said adverse claim was withdrawn in said land office, the said Robinson, Huggins and Sterling performing on their part all of the terms and conditions of said contract to be by them performed.

V.

That at the date of the execution of the said bond, the said Robinson, Huggins and Sterling, Eddy and DeCamp were in the actual possession of the said com-

promise strip, and that they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of their said Nine Hour Lode Mining Claim.

VI.

That at the date of the execution and delivery of said bond it was expressly agreed between the parties hereto that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour Lode Mining Claim.

VII.

That the plaintiff herein is the successor in interest of the said Robinson, Huggins and Sterling, the obligators named in said bond, and it is also the successor in interest of Warren DeCamp and John W. Eddy, who were cotenants with said obligees in said premises at the date of the execution of said bond.

VIII.

That the conveyances introduced in evidence on the part of the plaintiff embrace and were intended to include the said compromise ground, and conveyed to the respective grantees therein named all the interest, legal and equitable, which the said grantor or grantors had in said premises at the date of the execution thereof, and it was the intention of the parties to the deeds to convey as well their interest in said compromise strip as every other part and parcel of the said Nine Hour Lode Mining Claim.

IX.

That on or about the —— day of July, A. D. 1893, the said plaintiff, as the assignee of the said Robinson, Huggins and Sterling, duly demanded a deed of said compromise strip of ground of and from said defendant, but the said defendant refused to execute such deed, and that no demand for such deed had ever previously been made upon the said Charles F. Mayger by the said plaintiff or any of its predecessors in interest.

X.

That on or about the tenth day of June, A. D. 1893, the defendant, Charles F. Mayger, assumed to convey the said compromise strip to his codefendant, the St. Louis Mining and Milling Company of Montana, but at the date of said conveyance, the said defendant, the St. Louis Mining and Milling Company of Montana, had full notice and knowledge of the equities of the plaintiff in and to said compromise strip and its possession thereof.

XI.

That the defendants wrongfully assert title to the ground in controversy, and thereby cloud the title and estate of plaintiff therein, and that plaintiff has a right to have such cloud removed from its title to the premises in controversy.

XII.

That the Court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendants.

**Conclusions of Law.**

I.

The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the "compromise ground."

II.

That the said defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title, or interest of any kind or character in or to the said compromise ground, or any part or portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

Dated June 1, 1895.

HORACE R. BUCK,
Judge.

[Title of Court, Title of Cause.]

**Judgment.**

This cause came regularly on to be tried on the tenth day of May, A. D. 1895, Charles J. Hughes, Jr., M. Kirkpatrick, and Cullen & Toole appearing for the plaintiff, and Messrs. W. W. Dixon, Toole & Wallace and McConnell, Clayberg & Gunn, appearing for the defendants. A jury having been expressly waived by the parties the issues raised by the pleadings herein were tried to the court sitting without a jury, and after the introduction of testimony on the part of the plaintiff and on the part of the said defendants, and the argument of counsel, and

after due deliberation, the Court having made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the equitable and entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described.

Now, therefore, on motion of counsel for plaintiff, it is ordered, adjudged and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, be specifically performed, and that the defendant the St. Louis Mining and Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to the said plaintiff a good and sufficient conveyance in fee simple absolute, free from all encumbrances, of and for the premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and, upon the failure of said defendant within the time aforesaid so to make, execute, and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name of and for and on behalf of the said defendant, the St. Louis Mining and Milling Company of Montana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is so executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one hereto attached and approved, and, upon recording a duly certified copy of

this decree, and of the said deed so executed by the said commissioner, in the office of the county recorder of the county of Lewis and Clarke, and State of Montana, the same shall have the force and effect of a conveyance of the said title from the said defendants to the said plaintiff; that the said defendants and all persons claiming under them or either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any thereof.

The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour Lode bears south 39 degrees and 32 minutes east; said course being at right angles to the boundary line of the St. Louis Lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six (226) feet to a point on the boundary line of the St. Louis Lode Claim, between corners one and two; thence south 20 degrees, 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis Lode; thence north 46 degrees, 10 minutes west along the line of boundary of said St. Louis Claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees, 28 minutes east along a line parallel to the boundary line of the St. Louis Lode Claim, between corners

two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained.

It is further ordered and adjudged that the plaintiff do have and recover from the said defendant its costs in this behalf sustained, taxed at the sum of one hundred fifty-five and 30/100 dollars.

And that the plaintiff have execution therefor, June 1, 1895.

HORACE R. BUCK,
Judge.

State of Montana,
County of Lewis & Clark. } ss.

I hereby certify that the foregoing is a full, true, correct and compared copy of original complaint, answer, findings of fact by the court and judgment in case No. 2834 Montana Mining Co. Ltd., vs. Charles Mayger, et al.

In witness whereof, I have hereunto set my hand and seal this 1st day of June, 1905.

[Seal]

SIDNEY MILLER,
Clerk,
By R. C. Clements,
Deputy Clerk.

COMPLAINTS IN OTHER SUITS.

Plaintiff then offered in evidence the complaint in case No. 3214 pending in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and Clarke, in which suit the defend-

ant herein is plaintiff and the plaintiff herein is defendant, such suit was commenced on the 10th day of June, A. D. 1895, to recover the sum of $45,000 damages against the plaintiff herein for mining, taking, carrying away and conveying to its own use 224 tons of ore, such ore having been so mined by plaintiff within the surface boundaries, extended downward vertically, of the compromise ground. Said complaint was so offered and read in evidence as an admission on the part of the defendant as to the value of the ore in the compromise ground.

Plaintiff then offered and read in evidence a complaint in an action commenced in the state court by the defendant in this action against the plaintiff in this action to recover possession of certain ore or its value taken out of the ground in controversy north of the 108-foot plane and above the 40-foot level in which it was alleged that the amount of ore was 8 tons and the value of the ore was $1,600.00.

## DEFENSE.

Mr. W. E. Cullen, one of the attorneys for the defendant, thereupon made the opening statement for the defendant to the jury. In such opening statement Mr. Cullen stated that it was admitted by the defendant that the foot-wall of the Drumlummon vein crossed the west side line of the compromise strip approximately at its intersection with the 133-foot plane. (Plaintiff's amendment.)

The defendant to maintain the issues on its part called and had sworn as a witness in its behalf, one John H. Farmer, who testified substantially as follows, to wit:

JOHN H. FARMER.

I am a civil and mining engineer, I made a survey of the surface boundaries of the St. Louis and Nine Hour Claims about June 10th, 1905. I made a map of the two claims from this survey. The red mark on this map shown running parallel with the easterly boundary line of the St. Louis, and across the compromise ground is intended to represent the apex of the Drumlummon lode. It crosses the west line of the compromise ground at an angle of 31° 41′. It is 10.6 feet from the center of the discovery shaft on the Nine Hour to the nearest point of the east boundary line of the compromise ground.

And thereupon the witness was asked the following question:

Q. Drawing a line at right angles to that one (indicating the east line of the compromise ground) 50 feet from the center of the discovery shaft, on the Nine Hour, where would it bring it to on the map? That is from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2 and 3 on the St. Louis?

To which question the plaintiff objected for the reason that the same was immaterial and irrelevant.

Which objection was sustained by the Court, and the witness was not permitted to answer the same.

To which ruling of the Court the defendant then and there duly excepted.

And thereupon the defendant's map was marked Exhibit "E" and introduced in evidence.

(Testimony of John H. Farmer.)

The Court in passing upon the last above objection said:

After examination of the pleadings and exhibits attached and reading such authorities that have been cited, I hold that the objections interposed by plaintiff are well-founded.

The way for the Court is clearly pointed out in the decision of the Circuit Court of Appeals in the 102 Federal, page 430. The judges there considered among other things that at the time of applying for a patent the locators of the St. Louis included in their survey a portion of the premises which were claimed by the owners of the Nine Hour, and that the latter made an adverse claim and brought an action; that this suit was compromised by an agreement that as soon as patent was obtained by the St. Louis, the owners thereof would convey back to the owners of the Nine Hour the 30-foot strip "together with all minerals therein contained," that the owners of the St. Louis obtained patent but refused to make the conveyance; that suit was brought "for the purpose of settling and agreeing upon the boundary lines between the said Nine Hour Lode Mining Claim and the said St. Louis Mining Claim"; and that after a favorable result to the Montana Mining Company, the St. Louis Company conveyed the 30-foot strip "together with all minerals, etc., therein contained."

The Court interpreted the conveyance in question, having regard to its terms and the subject matter involved and the surrounding circumstances, in order to ascertain the intention of the parties. The subject matter involved

(Testimony of John H. Farmer.)

was mining ground. The surrounding circumstances were that a controversy had arisen, the application for patent, the adverse claim, the action thereon, the compromise, the agreement, the suit for specific performance. The decision of the Court was that by the compromise, the St. Louis Company admitted that the claim of the Nine Hour people, that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory, was correct; that is to say, that the surface lines as claimed by the Nine Hour in the compromise were correct, and that the strip of land contracted to be conveyed was a portion of the Nine Hour Claim. The Court considered the antecedent circumstances referred to, leading up to and culminating in the deed, holding that they were properly to be considered in determining what was the intent of the parties to the contract. These antecedent circumstances are all part of the transaction which culminated in the deed, which finally executed the intent of the parties, as such intent had theretofore clearly expressed in the contract itself. There is no ambiguity in the contract and deed, and extrinsic evidence other than the writings themselves is not material.

The adverse claim, the action brought, settled, compromised and dismissed, the agreement made to convey the 30-foot strip, "together with all minerals therein contained," the suit for specific performance of the covenant, according to its terms, the decree made by the District Court of the State ordering specific performance

(Testimony of John H. Farmer.)

of the covenant, describing the property by metes and bounds, "together with all the minerals therein contained," and the deed made in pursuance of the decree, describing the property in the same terms, clearly expressed the whole transaction. There is no duty left to the Court to perform except to give legal effect to what the parties have expressly intended.

As indicated, this is not difficult in view of the decision of the Appellate Court, for it is expressly laid down that the use of the words "together with all the minerals therein contained" inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, "together with dips, spurs, angles, and also all the metals, ores, etc., therein"; and that in the absence of terms in the contract and in the conveyance, clear and explicit, manifesting an intention on the part of the St. Louis people to surrender the whole of their contention concerning the true location of the boundary lines, and also to divest its claim of its extralateral rights, which had not been in litigation, and which had not been assailed by the owners of the adjoining claim, the use of the words "together with all the minerals therein contained" was not sufficient. The Court entertained no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each the rights that would have attached, if the boundary line had been settled without controversy. They state their latter

(Testimony of John H. Farmer.)

proposition after consideration "of all the circumstances"; that is to say, of the particular circumstances adduced that there had been litigation over this mining property, a contract, compromise and deed, the court expressly adding, "and the language of the contract and of the deed sustains that conclusion."

My belief is that the deed was executed having reference to the Acts of Congress, and that the words of the deed did not include the minerals in that portion of the vein apexing outside of the compromise strip and having their apexes within the boundary of the St. Louis claim. The title held by the parties to the covenant and the title they acquired by the patent was just a title as was created and authorized by the laws of the United States to a quartz claim as distinguished from a title to land at common law, and the phrase "together with all minerals therein contained," when applied to the estate and premises held by the parties under the acts of Congress is to be regarded with relation to such laws of the United States and should not be given the effect it would have at common law.

The pleadings and the exhibits referred to and made part of the pleadings satisfy me that the parties to the covenant contracted with reference to such statutory rights as each held or might acquire to a quartz mining claim, and that it was the intention to restore the compromise strip to the Nine Hour Lode claim so that it might be held intact as part of the Nine Hour claim, pos-

(Testimony of John H. Farmer.)

sessing just such rights as it would have had if no claim had been made to it by the St. Louis Claim.

The metes and bounds in the description were necessary in describing the premises, and the conveyance was for the sole purpose of locating the surface and veins apexing within it; hence the phrase used in the deed will be limited to the estate and premises conveyed and the minerals therein contained, as defined by the statutes of the United States.

A careful reading of the opinion of the Circuit Court of Appeals shows that they regarded the instrument as one to convey back to the owners of the Nine Hour claim the 30-foot strip, and that execution of the deed was a restoration of the strip to the Nine Hour claim, of which it was always a part. This being so, its status is as if there had never been any trust relationship created, and as if it had never been patented as part of the St. Louis claim. Therefore, I must sustain the objection introduced by the plaintiff to this testimony. The defendant can make its offer in writing and the record will be kept clear.

I did not make the survey for the adverse claim filed by the owners of the Nine Hour Claim against the application to enter the St. Louis, but I resurveyed the lines of the adverse strip as shown by the records in the land office. The area in conflict was one acre and ninety-eight hundredths.

The witness here produced another map made by himself and testified:

(Testimony of John H. Farmer.)

This map shows the St. Louis claim and all the workings on the St. Louis as shown on plaintiff's map, and in addition it represents the continuation of the level under the 65-foot shaft. I made a survey of the level from the bottom of the 65-foot shaft northeasterly, and it is correctly platted on this map. If continued in the same direction, the apex of the St. Louis lode would cross the east boundary line of the St. Louis claim about 508 feet north of corner No. 2. The lead at the face of this drift is dipping slightly to the west. (The map referred to was marked Exhibit "G" and introduced in evidence.)

Witness continuing: This is a map showing a longitudinal section through the Drumlummon vein at the top of the Montana Company's apex shaft. It represents the apex shaft, the west boundary line of the compromise ground. It also shows the 190-foot level, the 18-foot level, the 46-foot level, the 85-foot level, and the raise connecting the 190-foot level with the 85-foot level. It also shows the several blocks of ground claimed to have been extracted by the defendant as shown by the testimony of Mr. Parks. I put on these blocks after Mr. Parks' testimony was given for the plaintiff. Blocks 6 and 7 are not put onto the map, because I could not locate them from the testimony.

The defendant upon the Court's ruling that no extrinsic evidence would be considered to interpret or explain the language in the bond of March 7, 1884, offers to call to the witness stand the following witnesses, and

(Testimony of John H. Farmer.)

to examine them on matters of extrinsic facts calculated to disclose the situation of the parties at the time the bond was executed, and the situation of the property, to wit, John Langan, William Robinson, Warren DeCamp, F. P. Sterling, John W. Eddy and Joseph K. Toole.

The Court refused to permit the witnesses to be called to the stand and required the defendant to submit the facts in the form of an offer of proof, to which ruling of the Court the defendant then and there excepted, the Court basing its ruling upon the decision of the Supreme Court of the United States in Scotland Co. vs. Hill, 112 U. S. 183.

And thereupon the defendant offered to prove the following facts by the witness, John H. Farmer:

That he has seen the complaint in the adverse claim suit of the Nine Hour against the St. Louis, referred to in the complaint in the specific performance case, and knows the description therein contained; that it represents an area of 1.98 acres, and that he has platted that description upon the map, Exhibit "E"; that it includes the 30-foot strip so called. That that area also carries the apex of the Drumlummon vein for a distance of several hundred feet, north of the 108-foot plane, as such apex is claimed by the plaintiff in this action, according to the development on its map, Plaintiff's Exhibit No. 1.

By Senator BROWN.—Is this offered for the same purpose?

(Testimony of John H. Farmer.)

By Mr. WALLACE.—This proof is offered for the sole and single purpose of showing as extrinsic evidence, the facts and conditions surrounding the property involved, and the parties to the compromise settlement, and for no other purpose whatever, and that 1.98 acres was involved in the adverse claim suit.

The plaintiff objects to any testimony for the purpose offered and as irrelevant and immaterial, and trying to put in extrinsic evidence, and not proper, and I add to the objection that so far as in I shall hereafter move to strike it out.

By the COURT.—I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit such facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Farmer, the defendant then and there and at the time duly excepts.

The defendant then offered to prove by the witness, William Robinson, present in court, that he was the person who located the Nine Hour claim, and the one who represented his co-owner Warren DeCamp at the settlement of said adverse claim suit, which was made in Helena, and that he was a plaintiff in that suit. That the whole area in conflict in that suit was 1.98 acres, the boundaries being as shown upon the Farmer map, Defendant's Exhibit "E," and that all this strip described in the bond was the easterly thirty feet of said 1.98 acres.

(Testimony of John H. Farmer.)

That in regard to the situation of the parties at the time of the compromise settlement, the plaintiffs in the adverse suit, the owners of the Nine Hour, had a discovery at the Nine Hour shaft, which was then at the points shown on Plaintiff's Exhibit No. 1, on the Drumlummon lode; that that shaft was distant ten and one-half feet from the surveyed side line, and the patented side line of the St. Louis; that ore had been discovered at depth, and in the Drumlummon vein in that shaft. That they knew that the vein dipped to the easterly, and its apex lay for many hundred feet to the north of the Nine Hour shaft inside of the adverse claim area aforesaid. That there were no other apexes or known veins cropping out in the thirty-foot strip; that there were no actual survey marks or boundary lines claimed by either plaintiffs or defendants in the adverse claim suit to have been along the line represented by the west side line of the compromise strip. That the instructions this witness had from his co-owner, DeCamp, with reference to the settlement, were that he was to surrender any portion of the surface so that he retained the rights to the ore beneath that had been all discovered in the Nine Hour shaft; that he acted for DeCamp at the settlement upon these instructions, and that he and his co-owners in the Nine Hour knew that they could not claim the minerals at their discovery and in the Drumlummon vein, unless they secured themselves against the apex rights, either by holding the apex and the sur-

(Testimony of John H. Farmer.)

face in which it appeared, or by getting a conveyance of the mineral in the vein so apexing in the adverse area. That one of the co-owners of the Nine Hour was Judge F. P. Sterling, and also that the whole matter was all talked over when arrangement was made, and it was considered with William Mayger personally in Helena, who represented the defendant, Charles Mayger, and it was the distinct understanding that they were to have, in consideration of their giving up the ground outside of the 30-foot strip, and of the apex that lay without it all the ores and the quartz rock that lay under the compromise strip surface, regardless of where the apex of the vein in which they lay might be. Mayger asked that Messrs. Toole and Toole, who were then his lawyers, should draw the settlement agreement. This was acquiesced in. Afterward the instrument now shown witness, being the original bond here offered in evidence, was brought down to Sterling's office, and he was told by Mayger that the present Governor, Joseph K. Toole, had drawn it. That he had confidence in him, and was uncertain on two points, first, whether Mayger could pay the fifteen hundred dollars named in that instrument and refuse to deed the thirty-foot strip, and second, whether the instrument would give them the mineral-bearing rock within the thirty-foot strip, and under its surface, regardless of the apex. That he went up to Governor Toole himself, with the instrument, and asked him directly about each of these questions, and was assured by him that they would have to make the deed,

(Testimony of John H. Farmer.)

and that this instrument as drawn covered not only the surface, but gave them all the minerals underneath the surface, without regard to where the veins in which they lay might apex. Because of this assurance, and for no other reason, they accepted the instrument in question in settlement of the suit, and he and his coplaintiffs dismissed the adverse claim suit.

As to the situation of the property, he would further say that the west side line of the Nine Hour, from the time it was located until the time it was patented, never was in any manner changed, and that the side line is the westerly line of the conflict area of 1.98 acres described in the adverse; that when the Nine Hour was originally located, the parallel single straight east side line of the St. Louis ran to the southeast corner stake of said claim, on the ground, which was planted twenty-five feet westerly of the said Nine Hour west side line, and the east side line of the St. Louis, as then located, of twenty-five feet on the south end, and fifty feet on the north end; that after he had made the discovery at depth in the Nine Hour shaft, it was known generally, and many people came up and tried to locate, and that shortly thereafter a new stake appeared away up in the Nine Hour surface. It was on the undisturbed country, never had been there before, and made the south end line of the St. Louis one thousand feet long. It included his Nine Hour discovery shaft, and all of the adverse area and very much more beside. When the St. Louis surveyed for patent they started their

(Testimony of John H. Farmer.)

east survey line down toward that stake, but when they got to a point within a short distance north of his Nine Hour shaft, they stopped at corner No. 2, put up a monument that had never been there before, and bent to the southwesterly, running an angular side line to their corner No. 3, all as shown on plaintiff's map, Exhibit No. 1, as to corners Nos. 2 and 3.

Plaintiff objected to it for the same reasons, and for the additional reasons that it tends to set aside solid deeds, records and decrees, by hearsay testimony, and by the imaginary thought of Mr. Robinson, as he recollects twenty years ago.

By the COURT.—I will sustain the objection.

To which ruling the defendant duly excepted. This exception by consent of Court was deemed to apply to the Court's refusal as to each separate fact offered to be proven by the witness DeCamp, and separate exception being deemed to be taken as to each separate fact.

The defendant then offered to prove by the witness Warren DeCamp, the following facts:

That he was a co-owner in the same adverse claim suit, and a co-owner in the Nine Hour very shortly after its location. He knew the settlement that was made of the adverse claim suit, and that he directed William Robinson to represent him in that settlement, which was had in Helena, he being at Marysville, and his instructions to Robinson were as stated in the offer of proof in the case of the witness, Robinson, and the reasons

(Testimony of John H. Farmer.)

for giving the said instructions were as therein stated. That this witness knew that the Nine Hour location west side line had never been changed; that it was the west side line of the adverse area in said adverse suit, and that as it was originally located there was a clear space between the east side line of the St. Louis, which was straight, single and without a turn or angle, of 25 feet to the south end and 50 feet on the north end. That he knew the southeast corner so marked of the St. Louis claim, as located, and that it was 25 feet at the nearest point from that stake to the Nine Hour west side line. That Robinson made a discovery of ore through a shaft at what is now marked Nine Hour shaft, on Plaintiff's Exhibit No. 1, and that that ore was in the Drumlummon vein, and that it was known that it apexed westward of the compromise strip, but within the adverse area, and that the adverse area carried the apex northward for several hundred feet, from the Nine Hour shaft, and for several hundred feet beyond the 108-foot plane. That other people had tried to come up and locate on the hill; that the vein dipped to the easterly. That after this discovery the stake that had been marked "southeast corner stake" of the St. Louis before was newly shaved and appeared with a mark on it, "S center stake of St. Louis," and a new stake appeared way to the eastward in the Nine Hour claim, itself marked "Southeast corner of St. Louis claim," making the south end line of that claim one thousand feet about in length, and including between that last-

(Testimony of John H. Farmer.)

named stake and corner No. 1 of the St. Louis, the greater portion of the Nine Hour surface, and practically all of the adverse ground and the Nine Hour shaft where Robinson had made his discovery. That in the following summer the survey for patent of the St. Louis was had, and they ran their east side line from corner No. 1 down toward this new southeast corner stake, but stopped at corner No. 2, where they placed a survey monument and where no mark had ever been before, and then they ran the line 2-3 as shown on Plaintiff's Exhibit No. 1. That witness was willing to surrender a portion of the surface of the adverse in order to be secured in the minerals and ores at depth where the Robinson discovery was, and in that vein, and he so instructed the witness William Robinson in that regard.

Plaintiff objected to it for the same reasons heretofore stated, for the reason that whatever previous transaction was had, whatever thoughts or talks were had between this witness and Robinson and anybody else, the contract merged in the decree and is long since settled.

By the COURT.—I will sustain the objection.

The Court having refused to permit these facts or any of them to be proved, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness

(Testimony of John H. Farmer.)

DeCamp, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness Frank P. Sterling that he was a co-owner in the Nine Hour at the time of the adverse claim suit and the settlement; that he was a lawyer and that he understood the rule as to apex rights; that he was advised of the situation on the ground as detailed by the offer of proof in the case of the witness DeCamp and Robinson as between the St. Louis and the Nine Hour Claim, and as to the discovery of ore by his co-owner Robinson in the Nine Hour shaft and the dip of that vein. That Robinson was present when the settlement negotiations were carried on and concluded in his office; that they transpired largely between William Mayger, who represented the defendant and his brother, Charles Mayger, and this witness; that the question of the adjustment was discussed between William Mayger and himself, and it was finally determined that the Nine Hour owners would give up the excess ground covered in the adverse if a sufficient area should be awarded the Nine Hour people, north of the Nine Hour shaft to protect them in the substantial enjoyment of the mineral that they had discovered in that shaft, which was the Drumlummon vein; and that this amount was agreed upon at fifty feet, but by some error in the actual description as contained in the agreement, to wit, the bond drawn by Governor Toole only covered forty and a fraction feet. That in consideration of this surrender of the

(Testimony of John H. Farmer.)

surface and the apex right within the surrendered portion of the adverse area the defendant Mayger was to and did forego all claim to any mineral lying beneath the surface of the compromise strip and its vertical plane without regard to where that mineral or the rock containing it might apex. William Mayger asked that Messrs. Toole and Toole, his attorneys, should draw the settlement instrument; this was acquiesced in and it was drawn by Governor Joseph K. Toole. When it was brought down for consideration, Robinson brought up the question of whether the fifteen hundred dollars named in the bond could be paid instead of giving a deed, and also the question as to whether the language as to minerals in the description covered the point desired, so as to include any minerals of any kind found beneath that surface, and he insisted on going to Gov. Toole with the instrument to talk it over. After he came back the instrument was sent to Marysville to be signed by Charles Mayger, and when it was returned, signed and acknowledged, we dismissed the adverse claim suit. We never would have accepted this less area of ground, or dismissed the adverse claim suit, except for the fact that we were preserved the minerals in the vein that we had discovered from the point of discovery on its dip to the eastward, and it was distinctly agreed between the parties to said bond that all such minerals should be and remain the property of the obligees therein named, and to their assigns.

Plaintiff objected to it for all the reasons stated in

(Testimony of John H. Farmer.)

the offer as to Farmer, Robinson and DeCamp, and all the other witnesses, and for the further reason it expressly appeared that this witness, whatever the talk and understanding was, was merged in the bond and must speak for itself.

By the COURT.—I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven and to the refusal to permit each and every single one of said offered facts to be proven by the witness Sterling, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness John W. Eddy that he was a co-owner in the claim at the time of the settlement, and that he was a lawyer, and further offers to prove substantially the same facts as set forth in the offer of proof as to the witness Sterling, except that Sterling and not Eddy conducted the negotiations with William Mayger, but Eddy was present.

Same objection.

By the COURT.—I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, and to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Eddy,

(Testimony of John H. Farmer.)

the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness John Langan that he had lived in Marysville always from the time of the location of the original Drumlummon and before the location of the St. Louis down to the present time. That he knew Cruse mountain thoroughly; that he heard of the William Robinson discovery in the Nine Hour on what is the Drumlummon vein at the Nine Hour shaft, as marked upon Plaintiff's Exhibit No. 1, and that immediately thereafter he went upon the ground intending to make a location; that the surface was cleaned then of all obstructions, rocks or brush, and any stakes in the vicinity on the south end could be readily seen. That he found the southeast corner stake so marked of the St. Louis claim; that he knew the west side line of the Nine Hour and its boundaries and knew where the stakes were, and that the line from the northeast corner of the St. Louis to the southeast corner stake as it then was on the ground passed 25 feet to the westward of the west side line of the Nine Hour at the south end of the St. Louis, and fifty feet to the westward at the northwest corner of the Nine Hour. That in the following year this stake was freshly blazed, viz., the southeast corner stake of St. Louis, and marked "S end center stake of St. Louis," and that a new stake many feet to the eastward appeared in ground where it never had been before, marked

(Testimony of John H. Farmer.)

"Southeast corner stake of St. Louis" and opposite the point that the survey line 1-2, on Plaintiff's Exhibit No. 1, the map, if continued in this direction, would have reached it, making the south end line of the St. Louis then about one thousand feet long. That there was no monument or mark of any kind at the survey corner No. 2 on the east side line of the St. Louis, as shown on Plaintiff's Exhibit No. 1, until the following summer, when the survey for patent of the St. Louis was made, when that monument was first put up, and the same is true of the survey, corner No. 3. That this witness has no interest whatever in this controversy and is in no manner related in business or otherwise connected with any of the parties concerned.

Plaintiff made the same objection to it and all of these other offers connected with these witnesses; they are all applicable to this offer.

By the COURT.—I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Langan, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness Robinson and DeCamp that prior to the change in the southeast corner stake of the St. Louis claim there was no

(Testimony of John H. Farmer.)

stake whatever standing within the boundaries of the Nine Hour Claim as stated. That after the stake marked southeast corner St. Louis had been moved up onto the Nine Hour ground they went together and removing the stones found piled around said stake, found the grass of 1881 green and growing under there.

Same objection as to Robinson.

By the COURT.—I will sustain the objection.

The Court having refused to permit such facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witnesses Robinson and DeCamp, the defendant then and there and at the time duly excepted.

The defendant offered to prove by the witness J. K. Toole that while he had no distinct recollection of drawing the bond for a deed which is exhibit "A" attached to the answer, he recognizes the same as being drawn by him, and that he is able to say that the words "together with all the minerals therein contained" were inserted therein because he was informed at the time the bond was drawn that it was the agreement of the parties, obligor and obligee therein named.

Plaintiff objected to it as entirely irrelevant and immaterial.

By the COURT.—I will sustain the objection.

The Court having refused to permit these facts, or

(Testimony of John H. Farmer.)

any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Joseph K. Toole, the defendant then and there and at the time duly excepted.

The defendant at this time and as a part of the proof explanatory of the bond contract and the phraseology therein contained at the close of the metes and bounds description, as follows, "together with the minerals therein contained," offers in evidence the original bond from Charles Mayger to William Robinson, acknowledged March 7th, 1884, and recorded March 8th, 1884, on page 325 of book 4 of Miscellaneous records of Lewis and Clarke County, Montana, for the purpose of showing that the same is a pen and ink writing and all, save the acknowledgment, in the handwriting of J. K. Toole, who witnesses the instrument.

Plaintiff objected because the bond in itself is immaterial; because it is made a part of the answer in this case and therefore it is unnecessary and not only conceded in this case, but was the basis of a former suit.

By the COURT.—I will sustain the objection.

To which ruling of the Court the defendant then and there duly excepted.

The defendant then offered in evidence the complaint, the original complaint, and the replication in case No. 2798, old series, William Robinson, et al. vs. Charles F.

(Testimony of John H. Farmer.)

Mayger, being the adverse claim suit referred to in the record, in the specific performance case put in evidence by the plaintiff as a part of its case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon Defendant's Exhibit "E" by the witness John H. Farmer.

To which plaintiff objected as being immaterial.

Such objection was sustained by the Court and the defendant then and there duly excepted. And said complaint did describe as the area involved, the said 1.98 acres.

The defendant called and had sworn as a witness for the defense one Samuel E. Bowlby, who testified substantially as follows:

SAMUEL E. BOWLBY.

I live at Marysville, Montana, and I am in the employ of the Montana Mining Company, Limited. I have been in the employ of this company for 11 years. I was one of the bookkeepers from the year 1894 until September, '99. My title was store-keeper, but I was assistant accountant. The books which I have produced here are the company's books kept in the regular course and conduct of its business. I first produce what is known as the revenue book. This book is the monthly sheets, it is a complete record of the cost of mining and milling and of all expenses connected with the company from the first to the last of the month inclusive. Here

(Testimony of Samuel E. Bowlby.)

is the stock ledger, another of the company's books. It is marked "Ledger of the Montana Mining Company, Limited," and it covers the period represented by the monthly sheets that I have spoken of, to wit, November 1, 1898, to May 1, 1899. This book is the invoice book, it is marked "Invoice from December, 1897, to April, 1899." It is one of the regular business books of the company kept as such during that period. This book marked "Cash Montana Mining Company, Limited," is the only cash book kept, except petty cash during the periods referred to. This abstract, Defendant's Exhibit "J," is a tabulated statement of the contents of the books. I am familiar with it. I have checked the first column marked "A" with the revenue sheet, the figures are the result developed under that head. Column "B" I checked against the revenue sheet and found it correct, so also with columns L, M, N, O, P, Q and R, they are correct.

Whereupon the company's books were offered and received in evidence, as also was Defendant's Exhibit "J."

Defendant called and had sworn as a witness in its behalf, one Albert E. Gregory, who testified as follows:

ALBERT E. GREGORY.

I am 25 years old. I live in Marysville, Montana. I am the bookkeeper for the Montana Mining Company, Limited, and have been such bookkeeper for three and a

(Testimony of Albert E. Gregory.)

half years. I have examined this abstract, Defendant's Exhibit "J." It came from the business account books of the company and from the bullion books and other books identified by Mr. Bowlby. I have checked column "C" with the books and found it correct, as also column D, E, F, G, H, I, J, K, T, U, V, W and X.

Whereupon defendant offered in evidence "Abstract J" which was received in evidence over plaintiff's objection. Such abstract is as follows, to wit:

| Date | a<br>Tons to Stamp Mill | b<br>Mining and Milling per ton | c<br>Cash from Bullion | d<br>Cash from Concentrates | Total Cash Receipts | Value per ounce | Value per ton from Sales | f<br>Tailings per cent copper | Tailings per cent | Assay value per ton | Assay value per ton |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1898: | | | | | | | | | | | |
| Nov. | 3470 | $ 8.72 | $ 23993.88 | $ 6300.20 | 30696.88 | $ 5.30 | | | | | |
| Dec. | 3616 | 8.25 | 24056.67 | 8118.38 | 32175.05 | 5.01 | | | | | |
| 1899: | | | | | | | | | | | |
| Jan | 3646 | 5.20 | 23355.45 | 1753.33 | 25108.78 | 4.86 | | | | | |
| Feb. | 3400 | 6.01 | 20450.86 | 2488.39 | 22939.25 | 4.80 | | | | | |
| Mch. | 3686 | 4.87 | 14975.79 | 2874.95 | 17850.74 | 5.48 | | | | | |
| Apl | 3590 | 6.60 | 23263.98 | 8187.37 | 31451.35 | 5.62 | | | | | |
| | 21408 | $ 5.57 | $ 142565.81 | $ 17906.12 | $ 162971.93 | | $ 14.44 | $ 3.03 | | | |

679 Tons
6808 Tons

Defendant also called and had sworn one Thomas Lahiff.

THOMAS LAHIFF.

I live in Marysville, Montana. I have been mining for 17 years. I worked in the Drumlummon mine commencing in '89, and continuously until last February or March. I accompanied Professor Parks on the 20th day of July, 1899, when he was sampling the Nine Hour apex shaft. He took six samples, five of them in the apex shaft, and one in the 85-foot level. I kept a memorandum at the time. At the first point he took two sacks, this was 18 or 20 feet below the surface. Number 2, he took three sacks. Number 4, he took one sack. Number 5, he took one sack. Number 6, the 85-foot level, about 35 pounds. I think the first three samples were all taken over the 20-foot level. The sampling was not fairly done. It was what might be called a picked sample. He took too much of the bright stuff, the richest ore, letting the balance go.

George H. Burley, witness on behalf of the defendant, being first duly sworn, testified as follows, to wit:

GEORGE H. BURLEY.

My name is George H. Burley. I am 38 years of age. I have lived in Marysville, Montana, for 12 years. I have been engaged in mining for 24 years, in quartz mining 17 years. I know the Drumlummon vein and am familiar with its ores. Last Saturday we went down

(Testimony of George H. Burley.)

below the top of the Montana Company's apex shaft, a distance of about 20 feet of the collar. We cut cribbing at that point and drove in a drift in the north end. We ran in 8 feet in copper stained quartz in place. In running the 8 feet, we ran downward, so that at the end the drift was about 2 feet lower than the point where we started in the apex shaft.

Defendant also called and had sworn as a witness in its behalf one Charles W. Goodale, who testified substantially as follows, to wit:

CHARLES W. GOODALE.

I am 50 years of age and am a mining engineer. I have lived in Montana for 20 years. I graduated from the institute of Technology in Boston in 1875, and have been continuously engaged in the practice of my profession ever since. I have known the Drumlummon vein or mine since 1893. I was consulting engineer for the Montana Mining Company, Limited, the defendant, from 1893 to 1898. I am familiar with the manner in which the business books of the company are kept, and with the method of keeping mining accounts in general use in this state and elsewhere. I am familyiar with the methods pursued by the Montana Mining Company, Limited, the defendant herein, in keeping its accounts and from such it is easy to determine the cost of mining and milling the ores, and the amount or value of the product. I have made an examination of the defend-

(Testimony of Charles W. Goodale.)

ant company's books to determine the cost of mining ore as mined by them from December 1, 1898, until May 1, 1899, and I have an abstract made in part by myself of such books for that period. The books I used are here in court. The abstract is Defendant's Exhibit "J." The defendant has two quartz-mills known as the 50 and 60-stamp mills. The part of their mills used for ores carrying silver, was the 20-stamp side of their 50-stamp mill. The cost of mining and delivering the ore to the mill was $4.08, the cost of milling per ton during that period was $2.03. The cost of mining and milling as given included all development work, salaries of officers of the Montana Company, taxes, insurance and hay and oats for the stock. Eliminating these last-mentioned items the cost of mining and milling would be approximately $5.00 per ton. The saving as shown by the books was 85.6% in bullion and concentrates of the battery, which was a good recovery.

The 46-foot level represents about the richest part of the ore body taken vertically. Block 10 is below the good ore area. The 190-foot level or about 100 feet of it was run while I was with the company as its consulting engineer. The ore in block 10 is very low grade, so low that for the last 20 feet of it at least, it would not pay for mining and milling. There would be no difficulty in getting a sample from the back of block 10 in the 190-foot level. Blocks 4 and 9 are still in the ground. In 1899, prior to the former trial of this case, I visited the ground and I saw high-grade ore above

(Testimony of Charles W. Goodale.)

the 18-foot level. I went up to the surface, satisfied myself by examination going up that these blocks remained in the ground. That is the two blocks, the 4 and 9 are substantially the same thing, being divded only by an imaginary line. I went up through the plaintiff's stopes on the north side of the ground from the 20-foot level to the surface and saw the north side of the ore body all the way up.

I have examined the Drumlummon vein in the St. Louis claim. It enters the claim at about the 529-foot plane. No part of the apex passes through the north end line of the St. Louis. I have examined all of the workings of the plaintiff in that vicinity and found no evidence that the Drumlummon vein passes through the end line of the St. Louis.

I have examined the veins in the St. Louis claim. The discovery shaft as marked on the map, Plaintiff's Exhibit No. 1, is to the south of the Transcontinental tunnel, there is a drift and a shaft. I have examined the tunnel very carefully recently, and I also examined it in 1893. The vein carried by the south drift is not the same vein as that carried by the north drift out of the Transcontintental tunnel. Opposite where the north drift enters the Transcontinental tunnel or nearly so, there is a seam which is a possible extension of that vein. No attempt has been made to develop that seam, except with a sample pick just picking into it a little. I have been through the north drift to its face, it measures about 247 feet in length.

(Testimony of Charles W. Goodale.)

Cross-examination.

The figures I gave of the cost of mining of $4.08, cover the last two months of '98, and the first four months of '99. I was not operating the mine at that time. I formed my opinion from the figures I found in the books, and the same with reference to the milling of $2.03.

I took the last course running north in the level from the 65-foot shaft, the discovery vein. It was noth 49° east, magnetic. I have made no complete survey of the 65-foot shaft level. I helped measure the drift out and in the last course of it I noticed it was bearing to the north 49° east as already stated, for something like 35 or 50 feet.

The defendant called and had sworn as a witness in its behalf, one Alexander Burrell, who testified substantially as follows:

ALEXANDER BURRELL.

I am 54 years old, and I am manager of the defendant company. I know where the 108 and the 133-foot planes are. Such ore as was taken out between those planes was mined between the first day of November, 1898, and about the middle to the 20th day of April, 1899, containing a large amount of silver. It was treated on the 20 side of the 50-stamp mill, which was reserved for this class of ore, being specially fitted for working sil-

(Testimony of Alexander Burrell.)

ver ores. I have been connected with the defendant company for 17 years.

Cross-examination.

We had at one time what we called our danger line, this was the east line of the compromise ground, and we worked up to that line until we received the deed, after the judgment had been affirmed in the Supreme Court of the United States. Prior to the receipt of the deed, we extracted ores to the easterly and below that line on the dip of the vein. All of the ore which was extracted in the vein south of the Montana company's apex shaft to the 133-foot plane and above the 190-foot level was taken out by the defendant prior to June 1st, 1899.

The defendant called and had sworn as a witness in its behalf one Carleton H. Hand, who testified as follows:

CARLETON H. HAND.

I am 46 years old. I reside in Butte, but at present am operating in Idaho. I am a mining engineer and assayer and have been engaged in that business since 1880. I know the St. Louis mine at Marysville, and knew it in 1893. In 1893, by the direction of Mr. William Mayger, about the middle of November of that year, I took certain samples in the Nine Hour claim of the defendant and assayed them myself. Among others I took a sample about 10 feet above the defendant company's 190-foot level, on the north face of the Montana company's

(Testimony of Carleton H. Hand.)

stope. The assay value of this sample was 1.1 oz. in silver, gold $1.60, or a total of $2.26 per ton. The next sample was No. 9 of the foot-wall streak, it was taken from about 20 or 30 feet above the 190-foot level. The sample taken was across a face of 8 feet. I obtained an assay of it of silver 6.1 oz., gold $10.40, total value per ton $14.06. My next sample was about 10 feet above where I took the sample last-mentioned. It was taken from 4½ feet of the hanging-wall streak at that point. That assayed 12.2 oz. in silver, $12.40 in gold, making a total of $19.72 per ton. I did not take any sample out of the 190-foot level, though I went to the north face of that level. I was looking for ore of value to see what had been extracted from the stopes or from the mine, and the appearance of the level was such that it did not appear to me to have any value, therefore I did not sample it.

Thereupon defendant recalled Charles W. Goodale, who testified substantially as follows:

CHARLES W. GOODALE.

I have seen Defendant's Exhibit "J." I checked columns C, D, E, I, J, K, T, U, V, W and X, and found them correct. The average value of the ore treated during the periods referred to was $14.44. The total expense of the treatment was $7.30 leaving a net balance of $6.48.

Defendant likewise called and had sworn one Charles A. Molson, who testified substantially as follows:

CHARLES A. MOLSON.

That he was 44 years of age; that he was a mining engineer, had followed that profession for 25 years; that he had learned his profession in Montreal, Canada; that he was for two years on the geological survey in Canada and was afterwards with the Pueblo Smelting and Refining Company of Pueblo, Colorado, and with sundry and divers other mining companies. That he had examined the discovery vein in the St. Louis mining claim, and was familiar with the Transcontinental tunnel and the levels running north and south from it. That he had examined the 65-foot shaft and the levels at the bottom of it.

The vein carried in the south drift from the Transcontinental tunnel is not the same vein as carried in the north drift. The vein in the south drift is cut off by the fissure which is followed in the Transcontinental tunnel. To the eastward of the said drift there is a slate and granite contact, there is at that point a possible movement of 8 or 9 feet indicated, but there has been no throw of 90 feet, there is nothing on the surface to indicate such a throw. The last 84 or 85 feet of the level in the north drift shows a turn of 10° to 12° northeast, and if the vein continues in the same direction, it would cross the easterly side line of the St. Louis claim near the 520-plane. There is a fissure on the

(Testimony of Charles A. Molson.)

southwesterly or right-hand side of the Transcontinental tunnel as you enter, which may be the continuation of the plaintiff's discovery vein. Where it goes to, I cannot say, as there is no work done on it.

I made an examination of the books of the defendant company that were offered in evidence here in connection with the preparation of Exhibit "J." Exhibit "J" is a correct abstract of what is shown on the books of the company. The value of the ore worked on the 20 side of the 50-stamp mill from November 1st, 1898, to May 1st, 1899, was $14.41 per ton. The cost of mining between the said periods as shown by the company's books was $4.08. The cost of treatment in the mills $2.03, which was reasonable both as to mining and milling.

Defendant also called and had sworn one Wilbur E. Sanders, who testified substantially as follows:

WILBUR E. SANDERS.

I am a mining engineer. I graduated in 1885 from the Columbia School of Mines in New York City, and since graduating I have had about 7 years of experience both working as a practical miner and in my business as mining engineer. I am acquainted with the properties here in controversy and have made a study of them. I examined the surface of the St. Louis mining claim for the purpose of ascertaining the course of its

(Testimony of Wilbur E. Sanders.)

discovery vein. I saw nothing on the surface which indicates the course of the vein. I examined the Transcontinental tunnel. From its entrance in for a distance of about 100 feet it is closely cribbed, and it is in granite and porphyry. The drift on the discovery vein from the Transcontinental tunnel runs to the bottom of the 65-foot shaft in granite. The walls of the vein are very nearly vertical. Where the north drift strikes the Transcontinental tunnel it turns toward the mouth of the tunnel as you go out and there is evidence of drag in that direction. About ten feet from the shoulder of the tunnel there is a vein fissure which goes into the south wall of the Transcontinental tunnel, it is apparent at that point from the drag of the quartz in that direction that there has been a faulting there, not a large one, but from 10 to 12 feet. The vein has been thrown by the Transcontinental fault fissure. The dip of the drift on the discovery vein and that of the fissure showing on the southwest side of the Transcontinental tunnel is practically vertical.

From the bottom of the 65-foot shaft, the course of the vein is north 73° east, and if it continues in that direction it would cross south of the 320-foot plane as shown on plaintiff's map. If the discovery vein from the point at which it is shown in the fissure on the southwest side of the claim makes as much of a turn to the west as is found in the north end of the vein toward the east, it would cross the west side line of the claim.

I can find no evidence that the vein shown in the south

(Testimony of Wilbur E. Sanders.)

drift from the Transcontinental tunnel is the same vein as plaintiff's discovery vein. I was not able to find any drag in the talc in the Transcontinental tunnel which would indicate a throw. Beyond the south drift where the granite meets the slates, there is the same throw as is shown by the discovery vein, and the fissure on the southwest side of the Transcontinental tunnel of which I have already spoken, and the throw as shown by the slate and granite contact, and by the discovery vein and the small fissure, is in the opposite direction to the throw as claimed by the plaintiff for its vein. If there had been a throw of 90 feet, one would expect to find a corresponding throw of the slate and granite contact, and to find it displaced in the same direction to about the same distance.

The defendant called as a witness in its behalf, one Miles Cavanaugh, who being first duly sworn, testified as follows:

MILES CAVANAUGH.

I am 69 years of age. I have mined all my life. A great deal of my mining was quartz. I know the St. Louis and the Nine Hour claims. I went up there to sample a portion of the 190-foot level in the Nine Hour. I got into it through the 85-foot level of the plaintiff. I sampled about 30 feet from the north end of the level. I commenced at the north end and I got down as near as I could get to three inches all around the north end, then I turned and got the same amount by way of crossing the

(Testimony of Miles Cavanaugh.)

back from the hanging-wall as near as I could get to about five feet. I could not get the foot-wall exactly. I sampled all the way back for about 30 feet. This is 3 or 4 inches was the width of a strip or the thickness of a strip. I spread a canvas and took my samples on that and sacked it as quick as I got it down. I sealed up the sacks and shipped it by express to Helena. Then I got a team and took it to East Helena and delivered it to Mr. Smith of the East Helena Smelter and received a receipt for it.

Which receipt was introduced in evidence, marked Defendant's Exhibit "N," and read to the jury as follows:

**Defendant's Exhibit "N."**

East Helena, Mont., June 26th, 1905.

Received of Miles Cavanaugh 40 sacks of ore, gross weight 2085 pounds.

AMERICAN SMELTING & REFINING CO.

By F. M. SMITH,

Assistant Manager.

There would be no material change in the character of the ore that would be found 7 feet below the back of the level from what the ore which I obtained from the back of the level and which made my sample.

Thereupon the defendant offered in evidence the certificate of the American Smelting and Refining Company marked Defendant's Exhibit "O."

Defendant's Ex "C"

MINE

American Smelting and Refining Co

SHIPPING POINT Marysville

EAST HELENA PLANT

ORE BOUGHT OF Miles Cavanaugh Date Settlement JUN 25 1905 190

| ASSAY PER TON | | | PERCENTAGE | | PRICES | DEBIT | CREDIT |
|---|---|---|---|---|---|---|---|
| GOLD | 0.11 | Ounces | For 95 Per Cent | $20 | Per Ounce | | 2 20 |
| SILVER | 1.0 | Ounces | For 95 Per Cent | 58 5/8 | Per Ounce | | 56 |
| LEAD | | Per Cent | For 90 Per Cent | | Per Cwt. | | |
| COPPER | | Per Cent | For 100 Per Cent Less 1-3 | | Per Pound | | |
| SILICA | | Per Cent | | | Excess | | |
| IRON | | Per Cent | | | Excess | | |
| ZINC | | Per Cent | Over 10 Per Cent | | Excess | | |
| MANGANESE | | Per Cent | | | Freight and Treatment per ton | | |
| LIME | | Per Cent | | | Totals | | |
| SULPHUR | | Per Cent | | | NET VALUE PER TON | | 2 65 |

| Serial Number | Our Number | Car Number | Gross Weight | Per Cent Moisture | Number of Sacks | Net Weight | Per Ton | DEBIT | CREDIT |
|---|---|---|---|---|---|---|---|---|---|
| | 611 | | | | 40 | | | | |
| | Mine No. a | Team | 2061 | 7.2 | 24 | 1913 | | 2 00 | Low grade |
| | | | | | | | Freight | | |
| | | | | | | | Sampling | 10 | |
| | | | | | | | Totals | | |
| | | | | | | | NET PROCEEDS | | |

DATE ASSAY June 27 1905

Handling

Chas Sinclair CHIEF ASSAYER

A CHARGE OF FIVE DOLLARS MADE FOR SAMPLING ON ALL LOTS OF ORE CONTAINING LESS THAN FIVE TONS, RATES EXCEPT ON CONTRACTS FOR SPECIFIED TIME OR SPECIFIED TONNAGE, SUBJECT TO CHANGE WITHOUT NOTICE.

Please Sign and Return Enclosed Voucher to us Promptly

AMERICAN SMELTING AND REFINING CO

KEEP THIS STATEMENT

By _____ Quotations used Date Settlement _____ Checked by _____

E H 13-1-05-10-M

Thereupon the defendant recalled Samuel E. Bowlby, who produced the defendant's bulletin book, and who testified as follows:

SAMUEL E. BOWLBY.

During the six and a half months ending June 30th, 1893, there was worked in the defendant's company's mills at Marysville 33,731 tons of ore, making an average yield of $7.27, or total gross yield $287,907.00.

The half year ending 31st of December, 1893; tons 32,553, average yield $9.98, gross yield $324,726.

For half year ending June 30th, 1894; tons 34,613, average yield $12.61, gross yield $63,446.00.

For half year ending 31st of December, 1894; total tons crushed 38,010, average yield $14,18, gross yield $539,148.

For half year ending June 30th, 1895; tons of ore crushed 27,230, average yield per ton $19.98; gross yield $544,061.00.

For half year ending December 31st, 1895, tons of ore crushed 37,790, average yield $13.14, gross yield, $496,662.00.

For half year ending June 30th, 1896; tons of ore crushed 37,180, average yield $10.36, gross yield $385,051.00.

For half year ending December 31, 1896; tons of ore crushed 25,150, average yield $11.20; gross yield $281,723.00.

(Testimony of Samuel E. Bowlby.)

For half year ending June 30th, 1897; tons of ore crushed 6,820, average yield per ton $14.58; gross yield $175,975.00.

For half year ending December 31st, 1897; tons of ore crushed, 37,290; average yield per ton, $9.48; gross yield, $353,620.00.

For half year ending June 30, 1898; tons of ore crushed 38,215; average yield per ton, $7.91; gross yield, $302,-317.00.

For half year ending December 30, 1898; tons of ore crushed 40,130; average yield per ton, $7.62; gross yield, $30,598.00.

For half year ending June 30th, 1899, tons of ore crushed 37,652; average yield per ton, $7.48; gross yield $281,723.00.

It having been shown that William Philpotts who was a witness for the defendant on the former trial of this case, and who is now absent in Australia, and not within the jurisdiction of this court, his testimony which was given on the former trial, was read from the stenographer's notes.

WILLIAM PHILPOTTS.

I am a mining engineer. I learned my profession in the Campbell School of Mines in England. I have been with the defendant company for five years. I know the 190-foot level and plaintiff's block 10. I took six samples in there. The first one 23 feet south of the north face. The second one is a sample of the ore that is in the drift.

(Testimony of William Philpotts.)

The third one is a sample taken about 16 feet south of the north face. The fourth is about 12 feet south of the north face. The fifth is 6 feet south of the north face, and the last one is a sample of the face. I am an assayer. I assayed these samples in the usual method. I made a sheet of the assays. Sample No. 1 went 0.12 of an ounce in gold and 0.6 of an ounce in silver, total value $3.34; No. 2 contained 0.11 oz. in gold and 0.9 oz. in silver, total value $3.41; No. 3 contains 0.12 oz. in gold and 0.5 oz. in silver, total value $3.38; No. 4 has a trace of gold and 0.7 oz. in silver, total value 42 cents; No. 5 has a trace of gold and 0.5 oz. in silver, total value $.30. No. 6 is 0.2 in gold and 0.8 oz. in silver, total value $.89. Thereupon the defendant produced a duly certified copy of the answer of the St. Louis Company in the case of the Montana Mining Company against the St. Louis Mining and Milling Company, known as the Specific Performance case, and read to the jury the verification to said answer, which said verification is as follows:

VERIFICATION.

State of Montana,
County of Lewis and Clarke, } ss.

Wm. Mayger, being duly sworn, makes oath and says that he is the general manager and superintendent of the said defendant company, and as such is an officer and agent thereof; that he has read the foregoing answer and

(Testimony of William Philpotts.)

knows the contents thereof; that the matters and facts therein stated are true to the best of his knowledge, information and belief.

WM. MAYGER.

Subscribed and sworn to before me this 17th day of December, 1894.

[Seal] HARRY H. YAEGER,
Notary Public.

NINE HOUR PATENT.

The defendant offered and read in evidence a patent of the United States, being Mineral Certificate No. 1357 issued to Charles A. Broadwater and others, for the Nine Hour Lode Mining Claim, designated as Lot No. 63, and describing the premises so conveyed as follows, to wit:

"Beginning at corner No. 1, a slate stone 33x15x9 inches marked 1-1705, a mound of rock along side from which a pine tree 9 inches in diameter marked B. T. 1-1705 bears S. 77° West 39 feet distant; thence, first course S. 62° 30′ E., and 326.4 feet to corner No. 2 a slate rock 20x12x6 inches marked 2-1705, a mound of rock along side. Thence second course 33° 52′ W. 1,420.83 feet to corner No. 3, a slate rock 22x14x12 inches marked 3-1705, a mound of rock along side, from which the location corner bears 33° 52′ W. 159 feet, distant. Thence, third course, N. 62° 30′ W. 438.5 feet to corner No. 4, a slate rock 20x12x9 inches marked 4-1705, a mound of rock along side. Thence, fourth course, N. 38° 19′ E. 493.6

(Testimony of William Philpotts.)

feet intersects S. W. end of line of survey No. 1089, the St. Louis Lode Claim, from which corner No. 3 of said claim bears S. 45° 30′ E. 68.5 feet distant, 660.6 feet to a point from which discovery shaft bears S. 72° E. 140 feet, distant 1,401.06 feet intersects the E. side line of said survey No. 1089. From which corner No. 2 of said claim bears S. 21° 15′ W. 545.58 feet distant 1437.6 feet to corner No. 1, the place of beginning; expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claim or survey No. 1089, and also all that portion of said Nine Hour vein or lode, and of all veins, lodes and ledges throughout their entire depth, the tops of apexes of which lie inside of such excluded ground. Said lot number 63 extending 1,420.83 feet in length along said Nine Hour vein or lode, the granted premises in said lot containing 10.42 of an acre of land, more or less, as represented by yellow shading on the following plat."

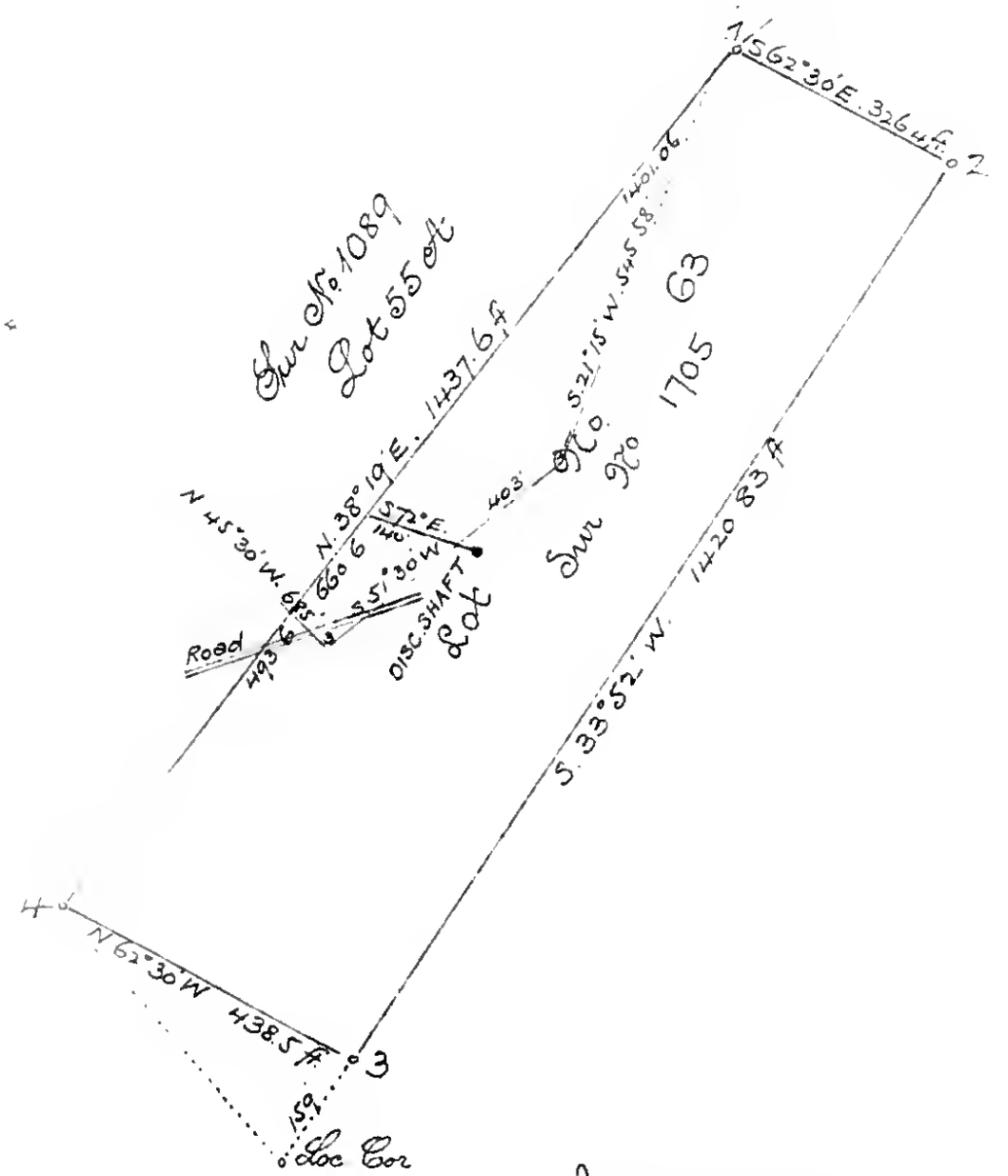
The plat referred to is herewith reproduced as follows:

Township 12 N. Range 6 W
Unsurveyed

Sec 36
1/4 Sec Cor
Sec 1

Township 11 N. Range 6 W.
Unsurveyed

N 53°14' E 650' ±




Scale of 200 feet to an inch

(Testimony of William Philpotts.)

Thereupon the defendant offered in evidence a duly certified copy of the original location notice of the Nine Hour lode introduced in the former trial of this case by the plaintiff and marked Plaintiff's Exhibit No. 3. To the receipt of which in evidence counsel for the plaintiff objected for the reason that said notice was irrelevant and immaterial. The Court having sustained the objection, the defendant duly excepted.

Defendant likewise called and had sworn one William F. Word, a witness in its behalf, who testified as follows:

## WILLIAM F. WORD.

I reside in Helena, Montana, and am by occupation a mining engineer. I graduated at the University of Michigan in the class of '85 and for the last fifteen years I have followed mining in one form or another. I have examined mines, have mined, superintended mining operations in the vicinity of Marysville, and have been employed as an expert mining engineer in numerous lawsuits. I have worked in similar mines in that vicinity. I have examined the surface of the St. Louis Lode Claim to ascertain the course or strike of its vein, and have been unable to find anything on the surface which would indicate that it passed through the end lines of the claim. I have examined the under-ground workings. The vein shown in the 65-foot shaft is plaintiff's discovery vein. This is the first vein you encounter on entering the tunnel, it has been followed by a drift to the bottom of the

(Testimony of William F. Word.)

discovery shaft. The vein is stoped out but clearly seen in the stope which is only about 30 feet high. The widest point in the vein is in the shaft about two feet. On the level in the face the vein is about 6 inches in width and dips slightly to the northwest. The dip of the vein from the Transcontinental tunnel to the 65-foot shaft is nearly vertical, but it has a slight dip to the northwest. It is about 170 feet between the two points mentioned. There is a small fissure having an almost vertical dip, showing in the southwest side of the Transcontinental tunnel near where the drift or opposite where the drift turns into the northeasterly fissure. It is about 9 or 10 feet outward from the point where the discovery vein meets the Transcontinental tunnel. Following along the Transcontinental tunnel about 90 feet from the point where the discovery vein meets it, we come to a drift on the vein to the southwest, this drift is what is marked on Plaintiff's Exhibit No. 1 as "Discovery." I examined to ascertain whether the two veins might have originally been one and faulted. I do not think they are one. I do not think there is any continuity or identity between them. The southerly one dips to the south, the other is nearly vertical. In addition to that, 30 feet further south the granite meets the slate on the right-hand side, and then 9 feet further on slate on the left-hand side of the tunnel. If these two veins had been one and faulted, in my opinion the slate and granite contact would have been faulted approximately the same as the vein. If there had been a throw of 90 feet, it would

(Testimony of William F. Word.)

mean that these two veins were originally opposite each other and the ground had been moved up the hill or down the hill as the case might be. In that case there would be drag in there. There should be drag a short distance at each vein. This drag I failed to see. By drag, I mean a portion of the vein would be drawn into the Transcontinental fissure. I examined it carefully and could not find anything of the kind.

Richard M. Atwater was called and sworn as a witness for the defense and testified substantially as follows:

RICHARD M. ATWATER.

I reside in Helena, Montana. I am a mining engineer. I took the course of mining and engineering at the Royal School of Engineers in Berlin, Germany, graduating in 1894, since then I have been continuously engaged in the mining business in Europe, in South Africa, in Australia, in British Columbia and in the United States. I have visited the properties in controversy in this action during the last four weeks and spent considerable time there. I examined the surface of the St. Louis for the purpose of ascertaining the direction or strike of the discovery vein. I found nothing to indicate it on the surface. Entering the Transcontinental tunnel, the first cross-cut that you come to is on the discovery vein. It runs in a northeasterly direction and has been considerably worked. There are two levels, in all about 25 or 30 feet high. Beyond the discovery shaft, the lower level turns slightly

(Testimony of Richard M. Atwater.)

more to the east and extends for a matter of eighty feet beyond the discovery shaft. This part of the level has not been stoped, the walls can be seen and the back of the level. Just at the face a block of slate is seen on the eastern side, crossing the level diagonally. The vein at this point is smaller and less well defined than for a distance of 70 feet further back.

On the opposite side of the Transcontinental tunnel from the discovery vein can be seen a distinct fissure which shows as a wide crack in the wall, dipping slightly to the east from 3 to 6 inches, perfectly plain and well defined. It may be and it may not be the extension of the discovery vein. It is impossible to tell until it has been drifted on, but it may be. Proceeding in a southerly direction, the next thing we come to of importance is the drift to the south about 90 feet further in from the discovery drift. Just a little ways further in than the south drift, we come to the contact of the granite and the slate. On the western side that contact is about 15 feet from the south drift. On the opposite side of the tunnel, the granite and slate contact is about 15 feet further in. These contacts are small but are sufficient to be correlated. It is my opinion that these were one and the same contacts, but that they were cut off by the fault fissure, and would therefore constitute a measure of the throw of that fault. I infer that either the western side has slipped 15 feet to the north or that the eastern side has slipped 15 feet to the south. Going back now to the point

(Testimony of Richard M. Atwater.)

where the discovery vein reaches the Transcontinental tunnel. If the fissure shown in the wall to the southwest is a continuation of the discovery vein, it would check up fairly well with the throw of 15 feet in the contact between the slates and granite which I have mentioned. This throw, if it occurred, would preclude the possibility of a 90-foot throw, as you cannot have a throw of 15 feet and another throw of 90 feet on the same fault with apparent parallelism of the various members in question. Furthermore, if these two drifts were on one and the same vein, before it was faulted, there would most certainly be dragged ore on each butt-end, showing the direction of the vein. That is the common way to find in which direction the vein has been faulted, and no such drag pieces are to be found in this case at either the butt-end of the discovery or the butt-end of the south drift.

If extended in its own direction, the discovery vein would cross the easterly boundary line of the St. Louis Claim between corners Nos. 1 and 2 at a point approximately 590 feet south of corner No. 1. I think the discovery vein is a very weak and irregular vein. I think the fissure is very likely caused by the Transcontinental fissure itself, and therefore it would only be a crack.

Cross-examination.

It is my opinion that the faulting movement shown in the Transcontinental tunnel could not have been for a distance of 90 feet because of the fact that the contact between the granite and the slate on the north side of

(Testimony of Richard M. Atwater.)

the Transcontinental tunnel is only 15 feet distant from the contact on the south side, and therefore it would be impossible for the vein shown in the south drift to be the same vein disclosed in the north drift from the Transcontinental tunnel, and also from other facts which I have stated. If drag could be found along the fault fissure between the northerly and southerly drifts from the Transcontinental tunnel it would be strong evidence that the discovery vein has been faulted and a part of this vein is disclosed in the southerly drift. I spoke of a fissure from three to six inches wide showing on the south side of the Transcontinental tunnel nearly opposite the north drift, which I said might be a continuation of the discovery vein. I regard this as a weak fissure and do not believe that it would extend for any great distance. It is true that the Drumlummon fissure is only three inches wide in places and that this vein extends across the country for thousands of feet.

Alexander Burrell being recalled as a witness for the defendant, testified substantially as follows:

ALEXANDER BURRELL.

My first experience in quartz mining was in Leadville, Colorado, in 1880. I returned to Montana again in 1888 and since that time I have been engaged with the defendant company in various positions, more or less connected with mining, for the entire period of seventeen

(Testimony of Alexander Burrell.)

years. I have been inside the Transcontinental tunnel from its mouth to its face and into the north drift to its face and southerly in the south drift to the working shaft of the St. Louis company. I have examined the north and south drift very closely and can see no evidence of what I would consider a fault or throw making these two drifts one vein. I think they are separate veins. On the southwest side of the Transcontinental tunnel near the level on the discovery vein there is a small gash vein that shows very plainly and is probably a continuation of that vein. During my development of the Drumlummon and the various mines connected with it I have driven out many small fissures in search of ore, and I have found a great many of them die out in the space of 20 or 30 feet. My opinion is that if this small fissure was driven out for a short distance, it would disappear. It might go 20 or it might go 100 feet.

The raise was made to the 85-foot level, and the excavation of Block 8 was made in November, 1898. After we had commenced work in Block 8, we were enjoined from further operation, and we stopped work upon service of the injunction order.

Thereupon the injunction order was identified by the witness, and was offered and received in evidence, and is as follows, to wit:

(Testimony of Alexander Burrell.)

[Title of Court, Title of Cause.]

**Provisional Order of Injunction.**

To The Montana Mining Company, Limited:

Upon reading and filing the complaint herein, duly verified, and the affidavit of William Mayger, on motion of Messrs. E. W. Toole and Thomas C. Bach, solicitors for the complainant,

It is ordered that you, the above-named defendant, Montana Mining Company, Limited, show cause before this court, at the court-room, in the Gold Block, in the City of Helena, County of Lewis and Clarke, State of Montana, on the 26th day of November, 1898, at 10 o'clock A. M., why a preliminary injunction should not be granted in said suit restraining you from further prosecuting any work or extracting any ore or other material from the vein, lode or ledge situated on the St. Louis Lode Mining Claim, in the Ottowa Mining District, in the County of Lewis and Clarke, and State of Montana, and particularly described in said bill of complaint as follows, to wit:

Commencing at a projected parallel and line of said St. Louis quartz lode mining claim, at a point on the east side line thereof, between corners 1 and 2, extended vertically downward whereat it passes through the hanging-wall of said vein, lode or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis quartz lode mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging-wall is dis-

(Testimony of Alexander Burrell.)

closed at the surface by an upraise at said projected parallel end line, five feet west of the east side line of said St. Louis quartz lode mining claim; then from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis quartz lode mining claim between corners 1 and 2, with the west line of the thirty-foot strip described in the complaint herein; thence south fifty degrees fifty minutes west 108 feet and along the west line of the said thirty-foot strip to a projected parallel end line of said St. Louis quartz lode mining claim, extended vertically downward which passes through the hanging-wall of said vein at the surface and at the crossing of the said hanging-wall with the west line of the said thirty-foot strip.

And it is further ordered by the Court that you and each of you, your agents, servants and employees be in the meantime restrained and forbidden from further extracting or removing any ore or other material from the said premises, or disposing of, treating or reducing any ores by you heretofore removed or extracted from said premises.

Dated Helena, Montana, November 19th, 1898.

HIRAM KNOWLES,

Judge.

(Testimony of Alexander Burrell.)

[Endorsed]: Title of Court. Title of Cause. Provisional Order of Injunction. Original. Filed and entered Nov. 23, 1898. Geo. W. Sproule, Clerk.

The order subsequently made modifying the temporary injunction was also read in evidence, and is as follows, to wit:

[Title of Court, Title of Cause.]

**Order Modifying Temporary Injunction.**

This cause coming on this day to be heard upon the application of defendant for a modification of the temporary injunction order heretofore issued in the said cause, so as to permit the timbering of a drift run by defendant into what is known as the compromise ground at the bottom of the plaintiff's winze near its 85-foot level, and also, so as to permit the defendant to remove and store the ore taken from the said compromise ground now in the defendant's chutes, supported by the affidavit of William M. Philpotts, and it appearing therefrom that the modification asked for should be granted, and everything being fully understood and considered;

Now, therefore, it is ordered and decreed that the said temporary injunction order heretofore issued in the said cause on November 19th, 1898, be and the same is hereby modified so as to permit the said defendant company to timber in a good and substantial manner the drift run by the said defendant for a distance of about 28 feet southerly from the south end of plaintiff's winze at or near its 85-foot level, so as to prevent the hanging-wall of

(Testimony of Alexander Burrell.)

the vein at said point from caving in, and to preserve the said drift from injury from caving.

And it is further ordered that the said injunction order be further modified so as to permit the defendant company to remove from the chutes running from the above-described drift down to defendant's 400-foot level, the ore now contained therein as set forth in said affidavit, and to store the same in a safe and convenient place where the same shall be always subject to the further order of this Court, and that upon removing the said ore the defendant shall file with the clerk of this court a true and correct statement of the amount of ore so removed, and the place where the same is stored.

It is further ordered that the said temporary injunction order subject to the foregoing modification be and the same is hereby continued in force until the further order of this Court.

Dated November 26th, 1898.

HIRAM KNOWLES,
Judge.

[Endorsed]: Title of Court. Title of Cause. Order Modifying Temporary Injunction. Filed and entered Nov. 26, 1898. Geo. W. Sproule, Clerk.

The affidavit of William Philpotts, upon which said modification was made, was also read in evidence, and is as follows, to wit:

(Testimony of Alexander Burrell.)

[Title of Court, Title of Cause.]

**Affidavit of William Philpotts.**

United States of America,
District of Montana. } ss.

William M. Philpotts, being first duly sworn says: I am over the age of twenty-one years, I am at present employed as mine superintendent of the above-named defendant, and I have been employed by said defendant for about four and one-half years in said capacity, and as assistant engineer. I am well acquainted with the working done by said defendant on the Compromise ground and on the Nine Hour Clain east of said Compromise ground, the said defendant has recently made an upraise from its 190-foot level on the Nine Hour claim to the bottom of the plaintiff's winze at or near its 85-foot level and from the south end of said winze it has run a large drift southerly in the said compromise ground, for a distance of about 28 feet. That said upraise starts on the said 190-foot level at a point about 15 feet east of the east side line of the compromise ground and runs thence through Nine Hour ground a distance of about the same number of feet before passing into the compromise ground, and from the point last named it is run wholly within the compromise ground. That the drift above mentioned is likewise wholly within the compromise ground, and from its commencement is north of the projected end line of plaintiff's said St. Louis claim as defined by the temporary injunction and the affidavit upon which the same

(Testimony of Alexander Burrell.)

is based; that the ground in said drift is of a soft and pliable nature, readily yielding to slaking by the action of the atmosphere; that by the service of said injunction the defendant was prevented from timbering said drift, which is absolutely necessary to preserve said drift and prevent the loss of large quantities of the ore therein contained. That the hanging-wall of the vein at said point would, if a cave occurred, fall with the ore and thereby seriously impair the grade of the ore, wherefore affiant says that defendant is likely to sustain great and irreparable injury if said injunction is not so modified as to permit it to timber said drift so as to protect the same. That the timbers therefor are provided and on the ground, and it will not take more than three or four days to put them in place.

And affiant further says that in taking ore from the said drift, it passes through a chute from said drift, down said upraise to the 370-foot level in defendant's Nine Hour ground; thence it is trammed a distance of about 100 feet to a chute leading to what is known as defendant's 320-foot level; from the point where said chute reaches said level, it is trammed a distance of about thirty feet to a chute leading to the 220 level; and thence it is trammed a distance of about sixty feet to a chute leading to the 400-foot level, from which last point it is trammed to defendant's mills; that at the time of the service of said injunction the chutes above named all contained ore taken from said compromise ground. Affiant

(Testimony of Alexander Burrell.)

says he is a civil engineer by profession, that he is well acquainted with where the lines of said compromise ground would fall in all of the workings of said defendant under ground, and knows as mine superintendent from what point the ore came which is now in said chutes, that there is not one pound of ore therein which did not come from said compromise ground, but the same all came from the drift above mentioned and described. That owing to the fact that said upraise reaches the bottom of plaintiff's winze, there is a strong circulation of cold air through said opening, and in the vicinity of said chute, which will freeze the ore contained therein into a solid mass, if allowed to remain therein without being disturbed for any considerable length of time, and if said ore is once frozen in said chutes, it will probably involve the destruction of said chutes in order to get it out, and new chutes will have to be constructed at great expense to defendant company in order to continue mining from said compromise ground, and defendant would otherwise be greatly injured and damaged thereby.

And affiant further says that he is well acquainted with the financial condition of the said plaintiff, and knows that it is insolvent, and that wages due to its late employees are due and that they have no means of recovering the same, and that the said plaintiff company has neither property or credit out of which any judgment for damages could be made.

And affiant further says that the temporary injunction

(Testimony of Alexander Burrell.)

heretofore granted should be further modified so as to permit the defendant company to remove the said ore from said chutes, and store the same in some safe place until the hearing of plaintiff's motion for a temporary injunction, or if worked, that defendant keep careful account of the same and the proceeds thereof and account for the same as may hereafter be directed by the Court.

That affiant is well acquainted with the financial condition of the said defendant, and that it is able to respond in damages to said plaintiff in many times the value of the ore now in said chutes, and further affiant sayeth not.

W. M. PHILPOTTS.

Subscribed and sworn to before me this 24th day of November, A. D. 1898.

[Notarial Seal] W. E. CULLEN, Jr.,

Notary Public in and for Lewis and Clarke County, Montana.

[Endorsed]: Title of Court. Title of Cause. Affidavit of William M. Philpotts. Filed Nov. 26, 1898. Geo. W. Sproule, Clerk.

The witness continued: There were 60 or 61 tons of ore taken out of this upraise, which ore is now stored in the yards of the Montana Mining Company subject to the order of this Court. About 40 tons of the ore that was taken out of Block No. 8 was milled and the remaining tons are in the raise above the 190-foot level. There must be 65 or 70 tons in the raise.

(Testimony of Alexander Burrell.)

I am the Alexander Burrell who was named as one of the defendants in this case when it was first brought, and the same person named as Alexander Burrell in the original complaint. At the time of the service of the summons, I resided at Marysville, Montana. I know Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell and Thomas Hawkins. They all resided at Marysville, Montana, at the time of the service of the summons in this case.

Cross-examination.

Some of the ore taken out between the 108 and 133-foot planes was shipped to the smelter. It is true that high grade ore was often mixed with the low grade ore in order to keep up the average of the mine. The ore from Block 8, which was taken out after the modification of the injunction order, was taken down to the 190-foot level and from the 190-foot level to the 400. This ore was put in the chutes with other ore. All of the ore in the chutes was taken out together.

IN REBUTTAL.

JOHN R. PARKS testified as follows: Assuming that the movement along the fault fissure disclosed in the Transcontinental tunnel had displaced the contact between the granite and the slate for a distance of 15 feet, I would still say that this fault fissure has caused a throw of 90 feet in the discovery vein. I have made a little model to explain the geology of that. (Model produced

(Testimony of John R. Parks.)

and explanation made to the jury.) There are workings below the Transcontinental tunnel along the fault fissure. There is one 50 feet below, one 150 feet below, and one 250 feet below. These levels are now and for some time have been inaccessible. There is a drag shown in all of the three drifts along the Transcontinental fissure below what is known as the Transcontinental tunnel. Down at the bottom there is unmistakable drag from the fissure in the north drift to the fissure in the south drift. As we go down in the lower workings the space diminishes between the north and south veins. Blocks 4 and 9 have been stoped out. I was in the stopes and surveyed the same and from this survey determined the cubical contents.

CHARLES MAYGER testified that Blocks 4 and 9 had been stoped out; that he had taken out the lagging on the north side of the Montana company's apex shaft above the twenty-foot level and found broken timbers and coved ground along where Block 9 was taken out.

WILLIAM MAYGER, recalled as a witness for plaintiff, in rebuttal, testified that the ore taken from Blocks 8 and 11, and all of the blocks between the 133-foot plane and the 108-foot plane, outside of the ores that were taken in 1893, were all mixed together promiscuously from the 190-foot level to the 400; that on the discovery vein of the St. Louis Claim there is a level running southerly from the Transcontinental tunnel to within 95 feet of the

(Testimony of William Mayger.)

south end line. There is another level 50 feet below that extends probably 200 feet from the Transcontinental tunnel and another level 150 feet below the Transcontinental tunnel that runs southerly probably 350 feet. There is also the 250-foot level. There is a working along the line of the fault fissure 250 feet below the Transcontinental tunnel. There is another working along the fault fissure 150 feet below. In that working there is a great deal of drag shown along the fault fissure between the northerly and the southerly sections of the discovery vein. There is also drag on every level. The Transcontinental tunnel is closely timbered on top, and for this reason the drag cannot be seen in that tunnel. I mean by drag, broken up quartz that has been rolled until its edges are worn. It is quartz that is not in place. This drag shown along the fault fissure is mineralized. The St. Louis company obtained an injunction preventing the defendant from sinking its apex shaft. The apex shaft had been sunk about 35 feet. After this injunction was obtained the defendant commenced stoping, and it was necessary to procure a second injunction. The sampling done by Mr. Hand was not specifically for value, but for the purpose of determining the width of the vein and the apex of the vein. I know that Mr. Hand went to Blocks 4 and 9. I went with him.

The foregoing contains a statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tends to prejudice the rights of the defendant.

(Testimony of William Mayger.)

And thereupon the evidence being closed, the defendant moved the Court in writing to direct the jury to return a verdict in favor of the defendant. Said motion is as follows, to wit:

[Title of Court, Title of Cause.]

**Motion for Verdict.**

Now comes the defendant, at the close of all the evidence, and moves the Court to direct a verdict in its favor, and against the plaintiff, on the following grounds, to wit:

1. The pleadings do not allege that the discovery vein of the St. Louis passes out through either end line, and there is no foundation for the introduction of evidence upon that issue, and without that issue proven there can be no extralateral right and no recovery.

2. There is no sufficient evidence that the discovery vein of the St. Louis in fact passes through either end line, and therefore the plaintiff has proven no right to any of the ores claimed in this action.

3. The plaintiff alleges in its complaint that the hanging-wall and the foot-wall of the Drumlummon vein on the south end, each pass out through the side line, and that the hanging-wall of the same vein passes through another side line in departing on the north end. Such a vein can have no extralateral rights; and as all the extraction involved in this section is outside of the vertical plans of the St. Louis side line, plaintiff cannot recover.

4. The evidence fairly shows that no part of the Drum-

lummon vein apex cuts either end line of the St. Louis, and therefore plaintiff has shown no rights to any of the ores involved in this action.

5. The decree in the specific performance suit, in evidence in this case, is a final judgment, perpetually enjoining plaintiff from ever asserting its possession or right of possession in any part of the premises known as the compromise strip, and as this action of trespass can only be maintained when there is possession or right of possession, the said decree is a perpetual bar to this suit.

6. The said decree, and the bond on which it is based, each serve to create of the west side line of the compromise strip a vertical common-law bounding plane, and to pass all minerals contained beneath the surface of said strip; and the plaintiff in the excepting portion of the premises described in the complaint expressly disclaimed any interest in the mineral therein contained.

7. The said decree and said bond granted to defendant's predecessor all the minerals beneath the surface of the vertical planes from the surface boundaries of said strip.

8. The plaintiff has failed to show the tonnage value of the ore extracted before the commencement of this action, and under the evidence there could be no finding of the amount or value thereof, and for ore extracted after the commencement of this action, there can be no recovery in this suit.

W. E. CULLEN and
W. E. CULLEN, Jr., and
WM. WALLACE, Jr.,
Attorneys for Defendant.

[Endorsed]: Title of Court and Title of Cause. Motion for Verdict. Filed June 30th, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

But the Court denied said motion and refused to so instruct the jury.

To which said ruling of the Court and to its refusal to give the jury such instruction, the defendant then and there duly excepted, and excepted to such refusal of the Court upon every specific ground in said motion contained.

Whereupon counsel for the plaintiff moved the Court for leave to amend the ad damnum clause of their complaint so as to change the $50,000.00 therein mentioned to $400,000.00, making the entire claim for damages $600,000.00.

To which amendment the defendant objected as follows:

By Mr. WALLACE.—Upon the statement of counsel in open court that his proposed amendment is to change the word fifty in the supplemental damage paragraph of the complaint to four hundred, and to change the words two hundred and fifty in the prayer, to six hundred, the defendant interposes the following objections to the application of plaintiff to make the amendment in question:

First: Because there is no showing of merits to warrant such amendment.

Second: Because the right to make the amendment is barred by lapse of time.

Third: Because the right never existed to make such an amendment in this cause of action for the reason that the effect would be to increase the amount claimed in

the supplemental portion of the complaint, between the period since the commencement of the action and the present trial. And that the law forbids the recovery in this kind of action of any damages save those damages resulting from acts of trespass committed prior to the commencement of the suit itself, and there has been no waiver of this unless it be as to the $50,000 plead as supplemental damages by the amended complaints of November 21st, 1898, and June, 1899.

Fourth: There can be no recovery of damages resulting from extraction from the Drumlummon vein since September 16th, 1893, and as the effect of the proposed amendment is simply to change the amount of damage alleged to have happened from extraction since that date the amendment would be unavailing and would allege damage within a period as to which the law will permit no recovery in this action.

Fifth: There is no testimony in the case showing or tending to show that the damage, if any, exceeds the sum of $276,000.00.

Sixth: That objections to the proof as to quantity in block and as to value as not justified by the pleadings were severally reserved at the time the proof was offered by the plaintiff, such objections and exceptions being taken upon the part of the defendant as to each block within planes 108 and 133 and as to each block shown by their testimony to have been extracted since September 16th, 1893, and such objections and exceptions being taken at the time severally that the proof was offered as

to each block, whether on the part of the witness Mayger or the witness Parks.

But the Court overruled each and every of said objections and allowed the amendment of said complaint to be made.

To which ruling of the Court the defendant then and there duly excepted.

Thereupon plaintiff having introduced its proof in rebuttal and rested, and after argument of counsel, the Court instructed the jury in writing as follows, to wit:

[Title of Court, Title of Cause.]

**Instructions to Jury.**

Gentlemen of the Jury:

To those whose pursuits in life may have been wholly aside from theoretical or practical mining, it is a complicated task to follow testimony with comprehension, through several weeks, where geologists and expert mining men are the principal witnesses, and scientific truths are involved in the trial. But I have observed that you have given very close attention to the witnesses, prompted, I am sure, by a conscientious desire to remember what they say, to understand their explanations, and to weigh their statements carefully and well.

A case like this is unusual in its importance. Sufficient allusion to its history has been made to disclose to you that it is a great legal battle, which has continued for many years, waged on the respective sides by counsel eminent for their learning in the law, who have been fighting for their clients with unflagging industry and skill;

all earnest in their views of the law, and each side strong in the assertion of the existence of facts upon which it bases its claims for a verdict and judgment. As jurors, it must have been interesting to you to watch the progress of such a trial, impressed with the fact that you constitute a vital part in the conduct of the litigation. Being impartial men sworn to bring in a true verdict according to the evidence, you are now about to approach the concluding act of your duty by weighing all the evidence, applying the law to it, disregarding extraneous matters not justified by the evidence, and thereafter stating your conclusions, upon which will rest the judgment of the Court and its ultimate determination of the rights of these parties.

In the courts of the United States, the Judge presiding at a trial is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinions upon the questions of fact, which he submits to their determination; yet you must understand that you, and not the Court, are to decide the facts. I leave the facts in unequivocal terms to your judgment as within your true and peculiar province.

By consent of the parties and the Court, you have inspected the actual present physical conditions. This will doubtless enable you to understand the situation more vividly that you otherwise could, and help you in weighing the evidence in its exact application to the whole case; and now that the testimony is concluded, and the arguments of counsel have been made, it becomes proper for the Court to charge you upon those principles and rules

of law which are pertinent to the issues, and which must govern in your deliberations.

The action is brought by the St. Louis Mining & Milling Company against The Montana Mining Company, Limited, to recover damages for an alleged trespass. The plaintiff, in its complaint, alleges the corporate character of the parties interested in this suit; the ownership of the St. Louis quartz lode mining claim, setting forth a description thereof; that the discovery, location and patent of the St. Louis mining claim was prior to the discovery, location and patent of the Nine Hour quartz lode mining claim; that the apex of the Drumlummon vein is within the surface boundaries of the St. Louis quartz lode mining claim, between the 520 and 133-foot planes, specified in the complaint; and that the plaintiff has a right to follow said vein on its dip to its uttermost depth, even though in its downward course it should pass beyond the vertical plane of its side lines. It further alleges that the defendant has entered upon that part of the said Drumlummon vein which has its apex between the two planes aforesaid, and extracted ore therefrom of the value of six hundred thousand dollars.

Defendant, in its answer, admits the corporate character of the parties, the ownership of the St. Louis quartz Lode Mining Claim, as alleged in the complaint, and that the discovery, location and patent thereof were prior to the discovery, location and patent of the Nine Hour Quartz Lode Mining Claim, owned by the defendant; and then denies generally each and every other allegation of the complaint. The defendant's answer then contains

affirmative allegations which are not important in this trial and therefore no further reference is made thereto.

1. The term vein, lead, lode and ledge all mean the same thing. A vein may be said to be a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place, carrying gold, silver or other valuable mineral deposits named in the statutes of the United States. It is whatever the miner would follow expecting to find ore, some formation within which he would expect to find ore, outside of which he would not expect to do so. The miners thus make the definitions of a vein. Geological opinions and definitions are not conclusive upon you as to the nature, element or width of a vein or its apex. The law has defined each, and the definitions of the law are controlling, as given you in these instructions. Judge Hawley, United States Judge from Nevada, in defining lodes and veins said; "To constitute a vein it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and does exist when filled in places with other matter. The fissure should, of course, have form and be well defined, with hanging and foot-walls. Between these walls will be found bodies of quartz, rich or poor, but there is also liable to be found in many places short or long distance between the quartz bodies or pay chutes where no quartz will be found in the fissure between the walls. Yet the vein exists, and is often as well defined as if the same was filled with quartz. The clay, the selvages, slickensides, striation, and ribbing of the walls are frequently as strong evidence of the indication

of permanency and continuity as the existence of the quartz itself."

2. The apex of the vein may be said to be the top of the vein at the point where it comes nearest the surface of the earth, the entire top of the vein between the two walls thereof, which comes nearest the surface of the earth.

3. At common law, which is the law we inherited from our ancestors, whoever owns surface of the earth, owns all beneath the surface, that lies within its boundary lines drawn downward vertically. This is still the law as to all classes of land except mineral land. If you make a homestead entry of public land, or enter it under any of the other public land laws of the United States, except the mineral land act, the government grants you title, not only to the surface, but to everything beneath the surface. For example, if you had entered in good faith a piece of agricultural land and obtained a United States patent for it, if afterward there was discovered within its surface boundaries, by yourself or anybody else, a mine, it would be absolutely yours, and no one could interfere with your working it, or mining it to any extent you might desire, so long as your work did not extend outside of the surface lines of your land extended downward vertically, but you could not follow the vein, or pay streak beyond your surface boundaries without becoming a trespasser. Since the passage of the mineral land act, when a mining claim is entered under its provisions, and a patent issued for it, it contains two features at variance with this common law right, which I have explained to you.

First. The patentee may follow, on its dip, any vein or lode, the top or apex of which may be found within its surface boundaries, to any depth, though on its course downward into the earth, it departs so far from the perpendicular as to pass out of his own ground through a side line of his claim projected downward vertically, and into the territory of his neighbor, and, secondly, it reserves to the adjoining claim owner the right to follow his lode, into and under the mining claim thus granted in the same manner. Thus a patent for a mining claim contains a grant and a reservation, neither of which is to be found in the patent for agricultural land. This is the extralateral right already referred to.

The extralateral right, thus conferred upon the patentee of a mining claim, can only be exercised in one way. Having the top or apex of the vein within the surface boundary of his own claim he must follow it down on its dip into the territory of his neighbor. He may not go upon his neighbor's claim and sink a vertical or other sort of a shaft down to the ore he claims, nor may he, by running a tunnel into or through or partly through his neighbor's claim reach the ore body claimed by him. If from lack of continuity of the vein, or from any other cause, he cannot follow the ore in on its dip, from its top or apex on his own ground, down into his neighbor's mining claim, then such extralateral right is lost to him, and the ore lying within the adjoining claim becomes the property of the owner of such claim, under the doctrine of the common law, which I have just explained to you.

4. The plaintiff claims extralateral rights on lode or vein which it alleges enters its St. Louis claim at what it terms its 520-foot plane, which is an imaginary line, if drawn down at a point 520 feet southerly from corner No. 1 of its claim, parallel to a line which it terms its end line, and which bounds its rights in a northerly direction. This vein, which in the evidence is generally termed the Drumlummon vein, traverses its claim in a southerly direction, passing out of its said claim through the westerly boundary line of the compromise ground, at what it terms its 133-foot plane, which is likewise an imaginary line parallel to what it terms its end lines and drawn down to the eastward on the Drumlummon vein on its dip. It claims that it has a top or apex, or a portion of the top or apex of this vein within the surface boundaries of its said St. Louis claim, and that therefore it has the right, under the mineral land act of the United States, to follow this vein down on its dip, though it passes through its easterly boundary line and into and under the mining claim of the defendant, known as the Nine Hour Claim. It is further claimed on the part of the plaintiff that the defendant has taken, carried away and converted to its own use, a large amount of ore, which was situated in the vein beneath the surface of its ground at points where the apex of the vein was within plaintiff's ground, and for this alleged trespass, the plaintiff claims damages. Now, as I have said, the owner of a mining claim is entitled to follow his discovery vein on its dip into the earth, though it may extend outside of the vertical side lines of his location and into the territory of his neighbor. This is

called the extralateral rights. He also has the right to pursue any other lode or vein, having its top or apex within the surface boundaries of his claim, to the same extent and in the same direction, as he may pursue his discovery vein. Suppose, for example, that the plaintiff has satisfied you that it has within the boundaries of its St. Louis claim, a discovery vein running generally in a northerly and southerly direction extending through the ground, included within the surface boundaries, and that the dip of this vein is to the east, then it would be entitled to follow this vein into and under the Nine Hour Claim, if following it on its dip, it extended so far. It would likewise be entitled to follow the Drumlummon vein on its dip for so much of the distance as the top or apex of that vein is found within the surface boundaries of the St. Louis Claim, as the plaintiff is entitled to extralateral rights on its discovery vein, as herein stated, and it would be entitled to all ore found within said Drumlummon vein for such distance, even though the same were under the Nine Hour surface lines.

5. The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a prima facie case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this prima facie case and these presumptions by

showing to the satisfaction of the jury that plaintiff has no extralateral rights.

6. Your first duty therefore is to examine and ascertain what, if any, extralateral rights attach to the discovery vein of the St. Louis Claim, and the plaintiff's extralateral rights on the Drumlummon vein, between the said planes, is controlled by its extralateral rights on its original or discovery vein.

7. It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis Quartz Lode Mining Claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence; but the defendant insists that the St. Louis Quartz Lode Mining Claim is not entitled to extralateral rights on the Drumlummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary or incidental vein of the St. Louis Claim. Under the statutes of the United States, the locators of a mining claim have the exclusive right of possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such vein, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. These extralateral rights, under decisions of the Supreme Court of the United States, as to the second-

ary or incidental veins, are the same as those given by the statute upon original or discovery veins; and if, therefore, plaintiff had extralateral rights upon its discovery vein, including that portion of the St. Louis Claim within the above planes in which is found the apex of the Drumlummon vein, so called, then plaintiff has extralateral rights upon that part of the Drumlummon vein. Plaintiff claims that the original or discovery vein of the St. Louis Claim runs through the earth beneath the surface of said claim in the general course of the side lines of said claim.

If you find from the evidence that the original or discovery vein of the St. Louis Claim, on its course or strike, passes through the earth within the limits of its surface boundaries, between the 520 and 133-foot planes, on a general course lengthwise of the claim, then plaintiff has extralateral rights to such parts of the original discovery vein between said planes, and would have corresponding extralateral rights upon any secondary or incidental veins having their apices in the St. Louis Claim within said planes.

8. If you find that the course or strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location.

And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extra-

lateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis claim, between the 520 and 133-foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis claim between such planes generally lengthwise of the claim.

9. And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) runs lengthwise of the St. Louis claim between its side lines, and extends from the 520 to the 33-foot plane, and dips easterly, then plaintiffs would be entitled to extralateral rights for that vein (or those veins) and to the like extralateral rights for all other veins having their apices within the same limits, and running in the same general directon.

10. Should you determine that the plaintiff, by virtue of its ownership of the St. Louis Quartz Lode Mining Claim, has extralateral rights to the Drumlummon vein, so called, between the 520 and 133-foot planes, the next question for your consideration is the amount of ore extracted from said St. Louis Mining Claim by the defendant herein. This is purely a question of fact, which you must decide from the preponderance of the evidence introduced before you by the respective parties and the presumption as herein stated. You must find from said evidence the amount of ore extracted from said Drumlummon lode by the defendant, and I charge you, as a matter of law, that defendant is liable to the plaintiff

for the value of such ore to the extent and for the amount hereinafter stated.

11. There are two rules established and adopted by the federal and other courts of the United States with reference to the measure of damages in cases of this kind, and which rule applies, depends upon whether or not the trespass under which the ore was extracted was willfully committed or done in good faith. If you find from the evidence that the defendant entered on that part of the said Drumlummon vein which apexes in the St. Louis Quartz Lode Mining Claim, between the planes aforesaid, and extracted the said ore therefrom willfully, recklessly and with knowledge that said vein did apex within the St. Louis claim, then your verdict must be for the value of the ore which you must determine from the evidence introduced. If, however, the defendant had sufficient reason to believe, and did honestly believe at the time it entered upon said vein and extracted and removed said ore, that the same belonged to said defendant and not to the plaintiff, and that it had lawful right and authority to extract and remove the same, then the trespass was not willful, and the plaintiff is entitled to the value of the ore, subject to the deduction for the reasonable cost of mining said ore, hoisting the same to the surface, and transporting the same to reduction works, and the reasonable cost of such reduction. The actual cost to defendant of all, or any of these items is not conclusive upon the value thereof. Defendant is not entitled to reduce the value of the ore by any sum greater than the reasonable value of the items above

mentioned, and you must determine such reasonable value from the evidence given in the case. In determining the character of the trespass, you have the right to disregard all testimony given by the defendant tending to establish good faith, if, in your judgment, the action of the defendant discloses to your satisfaction that the claim of defendant, that it acted under an honest belief that it owned the ore in question and had the right to remove it, was merely for the purpose of reducing the damages which it would have to pay for such ore upon a suit to recover the value thereof by this plaintiff, and find that the action of defendant in extracting and removing the ore in question was willful.

12. In determining the question of the good faith of defendant in extracting and removing the ore in question, you are entitled to consider all the facts and circumstances shown by the evidence; if you find that the defendant acted under an honest belief that it was the owner of the ore in the disputed ground, and had good right and lawful authority to extract the same, and that such belief was based upon such facts and circumstances as that you believe that an ordinary man, acting as you find the defendant acted, would have had the honest belief that he owned such ore and had a right to remove it, then the trespass was not willful.

13. The advice of counsel is admissible for the purpose of showing good faith and innocent intention on the part of the person who acts under it, but to be of avail for that purpose it must appear in the evidence that the party who relied upon the advice had made a

fair and full statement of all the facts concerning the point upon which the advice was given, to its counsel. If all the material facts were known to the client and not disclosed to the counsel, the advice would not sufficiently show good faith; and if the parties seeking the advice knew that such advice was incorrect, such advice should not be considered as sufficient upon the question of the good faith of the party.

14. The burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value; and in arriving at a verdict you are to take into consideration all of the circumstances and facts presented by the evidence in the case. However, if you are satisfied that the plaintiff has shown its ownership and given evidence tending to show the amount of ore extracted and the value thereof, the burden is upon the defendant to show, if it can, that the trespass complained of was not willful. A presumption arises from the extraction of the ore from a vein which has its apex within the plaintiff's claim, by the defendant, that the trespass was willful, and that the defendant is liable for the value of the ore taken from the mine. This presumption is, however, disputable, and the burden is upon the defendant to show in mitigation of damages that it was not a willful trespasser, and thus be relieved from the payment of the value of the ore stated in other instructions herewith given to you.

15. If you find that the defendant has prevented the plaintiff from ascertaining the exact amount of the ore

or its value, by extracting and removing the same, or has placed it beyond the power of the plaintiff to make such proof certain and specific, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by his conduct by making every reasonable intendment against him in favor of the party injured.

16. In estimating the damages to the plaintiff, if you find from the evidence that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by extracting the greater part of the ore, or all of the valuable ore in any particular places of the mine, or by mixing the ore taken from plaintiff's ground with ore of less value, belonging to defendant, or with any other material taken from any other places in the mine, then the jury, in determining the value of the ore taken, are at liberty to consider the highest value of ore found in the vicinity of the ore extracted.

17. If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use, quartz, rock and ore within the planes described in the complaint, from said vein, lead or lode, belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass, cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has

placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injuries it has sustained.

18. The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the money expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant or any salaries paid to its officers, or any wages to any persons except those actually employed and engaged in extraction, transportation and milling of the ores in question.

19. When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is

treated and considered the same as though it was a trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis claim and the ore extracted therefrom.

20. If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by the misconduct of the defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence.

21. As to the evidence disclosed by the books of defendant and the abstract thereof offered in evidence in behalf of the defendant, I charge you that to entitle them to be considered as sufficient evidence to prove the

value of the ore extracted from the Drumlummon vein, you must be satisfied that the ores taken from other parts of defendant's mine which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition.

22. In considering the weight to be given such books and abstracts of the defendant company, in determining the reasonable cost of the mining, hoisting, transportation and milling of the ore, you should be satisfied that the ore from other parts of the defendant's mine, mixed with the ores extracted from the plaintiff's vein, if you find such to be the fact, were substantially the same class or kind of ores; that it was mined for substantially the same cost as the ore of plaintiff; that it was hoisted and transported to the mill at substantially the same cost, and that it was of the same general character as plaintiff's ore, and would mill as easily and successfully and at the same general cost.

23. The law is well settled that if one willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value of which the property in question can be reasonably estimated.

24. It is a principle of law that if weaker and less satisfactory evidence is offered by a party, when it ap-

pears that stronger and more satisfactory evidence was within the power of that party to furnish, the evidence of a weaker nature will be viewed with distrust. You will apply this principle in determining the weight of the evidence before you upon all issues in support of which you find that either party had power to furnish stronger evidence and more satisfactory evidence than it has introduced upon such issue.

25. When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the burden of proof, it does not preponderate in his favor, but that the evidence of each party upon the issue is equal, in your judgment, it is your duty to find such issue against the party having the burden of proof, under these instructions. In determining the weight of the evidence you are not to consider alone the number of witnesses which have been sworn in behalf of either party, but to take into consideration the circumstances under which the evidence was given, the character and standing of the witnesses, their appearance upon the witness stand, and all the circumstances of their evidence, and after such consideration, you are to determine the weight and preponderance of the evidence upon each issue in favor of one or the other of the parties to this suit.

26. The plaintiff, in case the jury find a verdict in

its favor, is entitled to interest upon the amount found by the jury, from the date of the conversion of the ore by the defendant to the date of the rendition of the verdict by the jury, at the rate of eight per cent per annum. If you cannot determine the dates of conversion of the ores, by the defendant, the plaintiff is entitled to recover interest on the value of the ores extracted, as found by you, from the date of the filing of the amended and supplemental complaint herein, on the 26th day of June, 1899. And you should add such interest to the amount which you find to be the value of the ore extracted, for which defendant is liable to plaintiff as damages, and return the same as a part of your verdict.

27. The presumption that a witness speaks the truth may be repelled and the witness held to be impeached by the manner in which he testifies, by the character of his testimony, by evidence affecting his character for truth, honesty, or integrity, or his motive, or by contradictory evidence, or by statements made out of court not in accordance with his testimony upon the witness stand. The jury are the exclusive judges of the credibility of each and all the witnesses and the weight or value to be attached to the testimony of each witness.

28. There can be no recovery in this action for ores extracted after June 26th, 1899.

29. There is also in issue between plaintiff and defendant as to what number of cubic feet should be used in determining the number of tons, after you have computed the cubic contents of any given block or blocks. On this issue the burden is on the plaintiff, and you

will consider the whole evidence and use such a number of cubic feet per ton as in your good judgment, under all the evidence, would fairly represent a ton in weight of the particular ore involved. This may follow in different blocks if the ore varies in weight, and having determined this number of cubic feet per ton of any number of blocks, you will apply the same in determining the tonnage of the cubical contents for the purpose of fixing the value thereof.

30. The width of the ore extracted with the thickness thereof, is one of the material questions in this case, as to any block or blocks, you will carefully consider the evidence offered and the probable width thereof; and you will determine such width by the preponderance of the evidence upon that issue; and when you have determined it, you will apply this width, and no other, to the block or blocks as to which you find it to represent the true width of the ore extracted.

31. As to blocks 4 and 9, the defendant denies that they were ever extracted except the lower portion thereof, represented by the 18-foot level of the St. Louis company; and as to such portion, insists that they were extracted by plaintiff company. If you find they were not extracted by the defendant, then, of course, plaintiff is not entitled to recover for the value of the ore therein contained. If you are satisfied that the blocks 4 and 9 were extracted by the defendant, and that the plaintiff extracted the ore in the 18-foot level, you will award the plaintiff damages for the value of the ore extracted by the defendant, and not that extracted by

the plaintiff. But if you believe from the evidence that the 18-foot level to the extent that it underlines blocks 4 and 9 were all extracted by the defendant, then you should return damages to the plaintiff for the value of the ore so extracted to be determined by the other instructions in this case.

32. In considering any ore extracted from Block 8, part of which was removed under the authority of this Court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed, you should make a deduction in accordance with the general rule laid down in the charge.

33. As to the Parks samples, taken in July, 1899, which form the basis of his evidence as to the value, I advise you that they are not in any sense to be treated by you as taken either by the consent or the procurement of the defendant; and any evidence as to inquiries by Parks or Philpotts, or any one else present, to such alleged inquiry, cannot give any such effect to them; but they stand as if no such inquiries had been made, and are samples taken at the sole instance of the plaintiff,

and the defendant is in no manner bound by them, as it might by action of its own.

34. Where conflicting evidence is given, you should weigh it carefully and try to determine what was the fact. In doing so, you have the right to refuse to credit the testimony of any witness, if you believe that such witness was mistaken or had not the opportunity of determining or knowing the particular fact about which he has testified, or if you believe he has willfully testified falsely. The law gives you the right to determine the facts; it also clothes you with the power to determine the weight of testimony, and also to determine the credibility of all witnesses who have testified before you. You are not bound to take the testimony of any witness as being absolutely true unless you are firmly convinced that it is. When witnesses are otherwise worthly of belief and their testimony is conflicting, then the weight and credit should be given to those whose means of information were superior, and greater weight should be given to the testimony of witnesses who swear affirmatively to a fact, rather than those who swear to it negatively, and who show want of knowledge or recollection. You should endeavor in weighing the testimony given in this case, to harmonize the same, if it is susceptible of harmony.

WM. H. HUNT,
Judge.

During the argument of respective counsel, the Court directed the attention of counsel of both sides to Rule

No. 58 of the Rules obtaining in this court, and particularly to an annotation in the margin of the rules entered in the Judge's copy of the rules, which marginal note reads as follows:

"Exceptions must be taken before the jury retire. Rule 58 is to be so construed.

Mountain Copper Company vs. Van Buren, 133 Fed. 2 Wallace, 339."

After delivering the charge, the Court, before the going out of the jury for the considering of their verdict, requested counsel to submit any exceptions they might have to the charge, and to the instructions requested and given or refused.

Thereupon, before the jury retired, counsel for both parties retired to the Judge's room with the charge of the Court, which was in writing, in their possession, and prepared in writing such objections and exceptions to the charge and the several parts thereof, and to the refusals to charge, as they desired, and thereafter in court the defendant presented the following exceptions and none other, which were then and there received by the Court, and signed and allowed before the jury retired.

Such exceptions are as follows, to wit:

[Title of Court, Title of Cause.]

**Defendant's Exceptions to Charge.**

The defendant, immediately after the Court had charged the jury and before they had left their seats or retired to consider of their verdict, submitted in writ-

ing to the Court its objections and exceptions to the said charge, and portions thereof, which objections were then and there severally overruled, and defendant then and there duly excepted. The defendant also submitted in writing herein its objections and exceptions to the charges offered by the defendant and refused, which objections were likewise severally overruled and defendant then and there duly excepted.

Said objections and exceptions are respectively as follows, to wit:

1. To the refusal of the defendant's offered charge No. 1, because it correctly states the law and was not directly covered in the charge of the Court.

2. To the refusal of defendant's offered instruction No. 2, for the reason given in number one.

3. To the refusal of defendant's offered charge No. 3, for the reason as given in No. 1.

4. To the refusal of defendant's offered instruction No. 6, for the same reason as given in No. 1.

5. To the refusal of defendant's offered instruction No. 7, for the same reason as given in No. 1.

6. To the refusal of defendant's offered instruction No. 8, for the same reason as given in No. 1.

7. To the refusal of defendant's offered instruction No. 9, for the reason given in No. 1.

8. To the refusal of defendant's offered instruction No. 10, for the same reason given in No. 1.

9. To the refusal of defendant's offered instruction No. 11, for the same reason given in No. 1.

10. To the refusal of defendant's offered instruction No. 12, for the same reason given in No. 1.

11. To the refusal of defendant's offered instruction No. 13, for the reason gven in No. 1.

12. To the refusal of defendant's offered instruction No. 14, for the same reason given in No. 1.

13. To the refusal of defendant's offered instruction No. 15, for the same reason given in No. 1.

14. To the refusal of defendant's offered instruction No. 16, for the same reason given in No. 1.

15. To the refusal of defendant's offered instruction No. 18, for the same reason given in No. 1.

16. To the refusal of defendant's offered instruction No. 19, for the same reason given in No. 1.

17. To the refusal of defendant's offered instruction No. 20, for the same reason given in No. 1.

18. To the refusal of defendant's offered instruction No. 21, for the same reason given in No. 1.

19. To the refusal of defendant's offered instruction No. 23, for the same reason given in No. 1.

20. To the refusal of defendant's offered instruction No. 24, for the same reason given in No. 1.

21. To the refusal of defendant's offered instruction No. 25, for the same reason as given in No. 1.

22. To the refusal of defendant's offered instruction No. 26, for the same reason as given in No. 1.

23. To the refusal of defendant's offered instruction No. 27, for the same reason as given in No. 1.

24. To the refusal of defendant's offered instruction No. 28, for the same reason given in No. 1.

25. To the refusal of defendant's offered instruction No. 30, for the same reason as given in No. 1.

26. To the refusal of defendant's offered instruction No. 31, for the same reason as given in No. 1.

27. To the refusal of defendant's offered instruction No. 32, for the same reason as given in No. 1.

28. To the modification of defendant's offered instruction No. 36, for the reason that the modification incorrectly states the law, and the original instruction as offered does so correctly state it.

29. To the refusal of defendant's offered instruction No. 37, for the same reason given in No. 1.

30. To the refusal of defendant's offered instruction No. 38, for the same reason given in No. 1.

31. To the refusal of defendant's offered instruction No. 39, for the same reason given in No. 1.

32. To the refusal of defendant's offered instruction No. 40, for the same reason given in No. 1.

33. To the refusal of defendant's offered instruction No. 41, for the same reason given in No. 1.

34. To the refusal of defendant's offered instruction No. 42, for the reason that is given in No. 1.

35. To the refusal of defendant's offered instruction No. 44, for the same reason as given in No. 1.

36. To the refusal of defendant's offered instruction No. 46, for the same reason as given in No. 1.

37. To the refusal of defendant's offered instruction No. 47, for the same reason as given in No. 1.

38. To the refusal of defendant's offered instruction No. 49, for the same reason as given in No. 1.

39. To the refusal of defendant's offered instruction No. 50, for the same reason as given in No. 1.

40. To the refusal of defendant's offered instruction No. 53, for the same reason as given in No. 1.

41. To so much of charge No. 5 as says, that if plaintiff makes a prima facie case of extralateral rights for its discovery vein between the 520 and the 133-foot planes, then the defendant must show to the satisfaction of the jury that plaintiff has no such extralateral rights, because (1) The burden of proof never shifts as to extralateral rights for discovery veins, and (2) whoever has the burden is only required to establish the fact by fair preponderance of the evidence, and (3) that this charge does not correctly state the law.

42. To so much of charge No. 7 as says, that if plaintiff has extralateral rights on the discovery vein between the 520 and the 133-foot planes, it has extralateral rights on that part of the Drumlummon vein because (1) the same is not the law; (2) the Drumlummon, because entering and departing from the side lines of the St. Louis under the Court's charge can have no extralateral rights as a matter of law.

43. To so much of the same charge as says; if the discovery vein pases through the earth within the limits of the St. Louis surface boundary between the 520 and the 133-foot planes, the plaintiff has extralateral rights, both to it and the Drumlummon vein between those planes, for the reason last given, and also because it gives extralateral rights though the discovery vein does not cut or pass through either end or side line.

44. The defendant excepts to so much of the preliminary part of the Court's charge as refuses to consider the estoppel pleaded in defendant's answer, for that it is the duty of the Court to instruct the jury as to the law governing estoppels, and to submit to the jury the determination of such questions of fact as are within the issues.

45. The defendant excepts to charge No. 5, for that it is contrary to law in that the burden of proof throughout is on the plaintiff, and does not shift as therein stated.

46. The defendant excepts to the instruction No. 7 for that the same is misleading and does not correctly state the law governing extralateral rights on by-veins.

47. The defendant excepts to the instruction No. 8, for that it is contrary to the law, in that no presumption whatever arises with reference to the course of the discovery vein.

48. The defendant excepts to the instruction No. 17, for that it is contrary to law, is not sufficiently guarded and is misleading to the jury.

49. Defendant excepts to the 18th instruction, for that it is contrary to law and does not correctly define what mining and milling expenses may be deducted.

50. Defendant excepts to the 19th instruction, given by the Court, for the reason that it does not correctly define the possession plaintiff must have in order to support an action for trespass, and is not applicable to the facts proven and conceded in this case.

51. Defendant excepts to the 20th instruction, for

that it is misleading, contrary to the law, and inapplicable to the facts.

52. Defendant excepts to the 21st instruction for that it is contrary to the law, and inapplicable to the facts, and further it instructs the jury to disregard the most valuable and satisfactory evidence in the case upon the question of damages.

53. Defendant excepts to the 22d instruction, for that it is contrary to law and misleading to the jury.

54. The defendant excepts to the 23d instruction, for that it is misleading, inapplicable to the evidence, and contrary to law.

55. The defendant excepts to the 26th instruction given by the Court, for the reason that the statutes of this state do not allow interest on unliquidated demands; that it is contrary to law, and inapplicable to the evidence.

56. The defendant excepts to the 32d instruction given by the Court, for the reason that the same is contrary to law and would require the defendant to surrender its contention that such ore justly belongs to it.

Notice of the foregoing exceptions are given by the defendant and are received and considered by the Court before the going out of the jury on this 6th day of July, 1905.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Title of Court and Title of Cause. Defendant's Exceptions to Charge. Filed July 6th, 1905. Geo. W. Sproule, Clerk.

In defendant's proposed bill of exceptions, upon July 31, 1905, the defendant stated its exceptions to the charge given by the Court, in the following language:

"And thereupon and before the going out of the jury, the defendant objected in writing to so much of the preliminary portion of the Court's charge as instructed the jury that the affirmative allegations contained in the defendant's answer were not important, and that for that reason no further reference would be made to them. For that the Court should have instructed the jury with reference to the law of estoppel, and that the judgment rendered in the specific performance case and the judgment-roll which the plaintiff itself had introduced in evidence, was an issue in said case, and that the judgment therein rendered was an absolute and conclusive bar to the right of plaintiff to recover for any and all ores mined and extracted from the said compromise ground, without reference to whether the apex of the Drumlummon vein in which said ores were so found was within the St. Louis claim, in whole or in part, and that as to all ores therein contained, they should not take the same into account in estimating plaintiff's damages.

But the Court then and there overruled such objection, to which ruling of the Court, and to the giving of said instruction the defendant then and there duly excepted.

The defendant likewise objected to the fifth instruction as given by the Court, for that the said instructon requires the defendant to show the course or strike and dip of plaintiff's discovery vein, and the burden of proof

to show the same was and is upon the plaintiff, and does not change as in said instruction stated.

And for the further reason that the strike and dip of plaintiff's discovery vein is not an issue under the pleadings in this case.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court, the defendant then and there duly excepted.

The defendant likewise objected to instruction number 8 for the reason that no presumption arises that the discovery vein of plaintiff's said discovery vein extended through the entire length of its location. And for the further reason that the burden of proof as to the strike or dip of the discovery vein is upon the plaintiff throughout and does not change to the defendant. And for the further reason that if the strike or dip of the discovery vein of plaintiff's said St. Louis claim was material, it should have been pleaded.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court to the giving of said instruction, the defendant then and there duly excepted.

And defendant objected to the 17th instruction, for the reason that the same was contrary to law and was misleading to the jury, and in effect instructed the jury to award damages to the plaintiff if they should find that it mined any ores within the area claimed by the plaintiff after the service of summons upon it, and the same would indicate a willful trespass on the part

of the defendant, and that it left out of consideration entirely the effect upon the defendant's mind of the affirmation by the Supreme Court of the United States, of the judgment in the specific performance case, which was absolutely conclusive of defendant's right to mine said ores within said disputed area.

But the Court overruled each and every of such objections and gave said instruction.

To which ruling of the Court and the giving of said instruction the defendant then and there duly excepted.

And defendant then and there duly objected to the 18th instruction given by the Court to the jury, for that it was contrary to law and did not correctly, or at all, define what mining or milling expenses the jury might reasonably deduct, should they find that the trespass was not a willful one.

But the Court overruled each and every of said objections and gave said instruction.

To which ruling of the Court the defendant then and there duly excepted.

Defendant objected to instruction numbered 19 given by the Court to the jury for the reason that it does not correctly define, or define at all, the possession the plaintiff must have of the premises from which the ore was mined in order to support an action for trespass, in that the evidence showed that all of the ore was mined within the ground covered by defendant's patent for its Nine Hour claim, and that by the Defendant's Exhibit "A," the judgment in the specific performance case and the

deed made in pursuance thereof, the defendant was entitled to all the ores found within the compromise ground, and the defendant could not have a possession sufficient to support an action of trespass for any ores found beyond, and to the eastward of said compromise ground.

But the Court overruled such objections and gave said instruction.

To which ruling of the Court the defendant then and there duly excepted.

The defendant likewise objected to the 20th instruction given by the Court to the jury for that it was misleading and contrary to law, and inapplicable to the facts. And for the reason that it instructed the jury not to consider the evidence on the part of the defendant with reference to value of the ore mined in the disputed area, but to be governed entirely by the evidence of the plaintiff in that regard.

But the Court overruled such objection and gave the said instruction.

To which ruling of the Court and the giving of said instruction the defendant then and there duly excepted.

And the defendant also objected to the 21st instruction given by the Court to the jury for that it was and is contrary to law and inapplicable to the facts as proven and it instructed the jury to disregard the most valuable and satisfactory evidence in the case with reference to value of the ores extracted in the disputed area.

But the Court overruled such objection and gave said instruction.

To which ruling of the Court and to the giving of said instruction, the defendant then and there duly excepted.

The defendant objected to the 23d instruction given by the Court to the jury, for that the same was misleading and inapplicable to the facts and contrary to law.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court the defendant then and there duly excepted.

The defendant objected to the 32d instruction given by the Court to the jury, for the reason that the same was and is contrary to law in that it would require the defendant to surrender its claim to be the owner of the ore in controversy as a condition to prevent the recovery of damages for the extraction in this case, and its surrender and return to the plaintiff in the injunction case, should the injunction case be decided in favor of the plaintiff. And for the further reason that the Court should have instructed the jury that it could not take into account such ores as it was satisfied from the evidence were being held by the defendant under such injunction order.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court the defendant then and there duly excepted.

The Court declined to allow the exceptions as stated in the proposed bill of defendant, and directed that the bill incorporate the exceptions and objections made and

allowed before the jury retired, to which ruling of the Court the defendant then and there duly excepted.

REFUSED INSTRUCTIONS.

And the defendant before the commencement of the argument of the case to the jury, requested the Court to charge the jury in writing as follows, to wit:

"I. The defendant having heretofore and on or about the first day of June, A. D. 1905, recovered a judgment and decree against the above-named plaintiff in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein, and in evidence before you, and it not appearing from the testimony herein that said judgment, in so far as it awards all of the mineral contained in the compromise ground to the defendant herein has been, or was at any time modified, reversed or so restricted in its meaning as to apply only to such minerals as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said compromise ground, and it appearing further that in and by said judgment and decree the plaintiff herein was forever barred from all interest or claim to said compromise ground or to any part or portion thereof, or to the possession thereof, or of the minerals or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff as to any and all minerals contained in said compromise ground, whether the leads, lodes or veins wherein such mineral

is found have or have not their apices within the surface boundaries of the plaintiff's St. Louis claim or otherwise, and as for all alleged trespasses in said compromise ground, you will not take the same into your consideration or return any verdict therefor."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give said instruction the defendant then and there excepted.

The defendant also at the time and place aforesaid requested the Court in writing to charge the jury as follows, to wit:

"II. The Court instructs you that in order to entitle a miner to follow a vein or lode having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of the top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon lode within its surface boundaries. The Court therefore instructs you that as between these two planes, plaintiff would not have the right to follow this vein on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and the 133-foot planes."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give

the said instruction, the defendant then and there duly excepted.

The defendant likewise at the time and place aforesaid requested the Court in writing to charge the jury as follows, to wit:

"XII. It is alleged in the answer in this case that a judgment was duly rendered and given on or about the first day of June, A. D. 1905, in an action then pending in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff, and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of plaintiff by its replication filed in this action, that such judgment was rendered, but it is alleged that it was confined to such mineral, and to such mineral only, as was or is found in leads or lodes having their tops or apices wholly within the surface boundaries of said compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the compromise ground was distinctly in issue in that case, as appears by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of plaintiff's right to recover, for any and all ores which you may find that the defendant has mined within the

surface boundaries of the compromise ground extended down vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff.

In pleading, that is an issue which is affirmed or alleged on one side and denied on the other. For example, if you find from the complaint in the specific performance case, which has here been introduced in evidence, that it was alleged that the plaintiff therein is the owner of all the mineral contained in the thirty-foot strip or compromise ground, and that the answer of defendant in that case, the plaintiff in this case denies that the plaintiff in the specific performance case was so the owner of such minerals or any thereof, then this was an issue in that case. The judgment in said case being for the plaintiff therein, the predecessor in interest of the defendant in this action, not only for the compromise strip but for all of the mineral therein contained, such judgment is absolutely conclusive upon these parties in this case, and the plaintiff herein is not entitled to recover a verdict at your hands for any ore found within the surface boundary of the compromise ground extended downward vertically. The judgment or decree in the specific performance case upon this question concludes the parties to that litigation, and constitutes a bar to this action so far as the mineral contained in the compromise ground is concerned."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give

said instruction the defendant then and there duly excepted.

The defendant likewise, at the time and place aforesaid, requested the Court in writing to charge the jury as follows, to wit:

"XVI. The section of the mineral land act which grants to the owner of a mining claim the right of extralateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of the claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis claim introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right on the Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral rights, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise requested the Court in writing to charge the jury as follows, to wit:

"XIX. The burden of proof in this case is on the plaintiff, and unless you find from the preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, then your verdict should be for the defendant."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court, and to its refusal to give the said instruction, the defendant then and there duly excepted.

Defendant likewise at the time and place aforesaid requested the Court in writing to instruct the jury as follows, to wit:

"XXI. As I have already explained to you, plaintiff's extralateral right on the Drumlummon vein where the same is found within the surface boundaries of the St. Louis claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to, on its discovery vein, should that vein in its course downward on its dip extend to and under the surface boundary of the Nine Hour claim. The law does not contemplate that the owner of a mining claim should have a greater length of vein beneath the surface than it has length of apex of the vein on the

surface. For illustration, suppose that the plaintiff in this case had only one hundred feet of the apex of the St. Louis claim within the surface boundaries of its claim, and that it was so situated, with reference to the Nine Hour claim, that on its dip downward and under the surface of that claim it would have extralateral rights, then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour claim.

"Applying these principles to the case at bar, the Court instructs you that if you should find from a preponderance of the testimony that the vein in the 65-foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis claim and are practically coterminous therewith. To illustrate what I mean, suppose that you should find that at the northerly end of the discovery vein of the St. Louis it terminates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its 65-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or strike of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights on the Drumlummon vein. Then should you further find, from a preponderance of the testimony, that plain-

tiff's discovery vein on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis claim.

Walrath vs. Champeny Mining Co., 171 U. S. 297-308."

But the Court would not and did not give the said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

Defendant, as aforesaid, requested the Court in writing to instruct the jury as follows, to wit:

"XXIII. If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant unless the plaintiff has satisfied you by a preponderance of the evidence that such vein continues on its course through its St. Louis claim, and passes out of the south end line of its claim, or practically does so. If you should find from the evi-

dence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sixty-five-foot tunnel is found, but that it only extends into the wall of the tunnel for a few feet, and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as practically the southerly end of plaintiff's said discovery vein, and your verdict should be for the defendant."

But the Court would not and did not give the said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant as aforesaid requested the Court in writing to instruct the jury as follows, to wit:

"XXVI. The Court instructs you that your first duty is to examine and ascertain what, if any, extralateral rights attach to the discovery vein of plaintiff's St. Louis claim. In the first place, you must ascertain which of the surface lines, are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them out on the ground, and named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from

the evidence that the discovery vein of the St. Louis claim was in what has been denominated the 65-foot shaft, and that the vein therein discovered, on its course or strike through the claim, would pass out of the surface boundaries of the St. Louis between corners numbered one and two thereof, and that following said course in a southerly direction, it would pass out of the westerly boundary of said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered, and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights on the Drumlummon vein, or on so much of it as has its apex inside the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extralateral rights within or under the Nine Hour claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all of the Drumlummon lode found within their surface boundaries, but they could not pursue it on its dip an inch beyond the easterly line of the St. Louis claim, extended downward vertically. The plaintiff's rights must be

absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extralateral rights under the Nine Hour claim, it is plaintiff's misfortune, and one which neither this Court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein, and not across it.

Walrath vs. Champion Mining Co., 171 U. S. 297-308."

But the Court would not and did not give such instruction and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise at the time and place aforesaid requested the Court to instruct the jury as follows, to wit:

"XXVIII. It conclusively appears by the testimony in this case that it is an undisputed fact that the Compromise ground, or the thirty-foot strip, as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim.

The Court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis claim was first located and first patented, having been patented as a part of the St. Louis, the Compromise ground is to be regarded as standing exactly on the same plane, so far as priority

is concerned, with every other part of the St. Louis claim."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise requested the Court in writing to instruct the jury as follows, to wit:

"XXXI. Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded to the defendant company or its predecessor, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour does not involve any admission on the part of the defendant that the portion of the St. Louis claim outside of the compromise strip is prior in right or time to said strip. In a case where there is equality and not priority of right or location, and the hanging and foot-walls of the vein cross the different points, the width of the vein must be equally divided; and so, in this case, the plane would be drawn at the 120½-foot or half way between the 108-foot and the 133-foot plane, and there could be no recovery by the plaintiff except for ores shown by the evidence to

have been extracted north of this 120½-foot plane; and if as to any block or blocks or areas of extraction, the evidence leaves it doubtful as to whether any of it, or if any, how much of it was extracted north of the 120½-foot plane, you must treat that block or those blocks as having been extracted south rather than north of that plane, and there could be no recovery therefor, for the burden is on the plaintiff to show by a fair preponderance of the evidence what it is entitled to recover."

But the Court would not and did not give the said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise requested the Court in writing to instruct the jury as follows, to wit.

"XXXII. Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded to the defendant company or its predecessors, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the

grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging-wall and that there can be no recovery in this case for any ores extracted south of the 108-foot plane."

But the Court would not and did not give the said instruction and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

And the defendant prays that this, its bill of exceptions to the errors aforesaid, may be signed, sealed and made a part of the record, which is done accordingly this 14th day of August, A. D. 1905.

WILLIAM H. HUNT,
Judge.

Service by copy is hereby acknowledged this 15th day of August, 1905.

M. S. GUNN,
J. B. CLAYBERG,
BACH & WRIGHT and
ARTHUR BROWN,
Attorneys for Plaintiff.

[Endorsed]: Title of Court and Cause. Bill of Exceptions. Filed August 15th, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of August, A. D. 1905, the defendant filed its assignment of errors herein, as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff,

vs.

MONTANA MINING COMPANY, LIMITED,
Defendant.

## Assignment of Errors.

Comes now, the defendant, the Montana Mining Company, Limited, plaintiff in error, by Messrs. W. E. Cullen, Wm. Wallace, Jr., and W. E. Cullen, Jr., its attorneys, and says that the record and proceedings in the above-entitled case show there is manifest error in this, to wit:

I.

The witness, Wm. Mayger, having testified that the original location of the St. Louis Lode was at the point marked on the map (Plaintiff's Exhibit No. 1) as the 65-foot shaft and that a vein was connected with that original discovery.

Whereupon the witness was asked the following question:

Q. "Which direction does it run?

To which said question the defendant objected on the ground that the same was irrelevant and immaterial, and the Court erred in overruling said objection for that the direction or strike of the discovery vein was not in issue, there being no allegation in the complaint relating to the strike or dip of the discovery vein.

II.

The Court erred in permitting the witness William Mayger to testify as to the ground which had been stoped out by the defendant northerly of the 133-foot plane, and to point the same out to the jury on the map (Plaintiff's Exhibit No. 1). The witness having testified that the ground between the planes, from the surface down to the 190-foot level of the Montana company, had been stoped out by the defendant, was asked this question, to wit:

Q. "Point out to the jury westerly of the 133-foot plane where the stopes have been taken out?" To which question the defendant objected.

For the reason that the same was and is irrelevant and immaterial, because the stoping he was so required to testify about, was between plaintiff's 133 and 108-foot planes as shown on this map (Plaintiff's Exhibit No. 1), and between said points the plaintiff did not have the whole of the apex of the said Drumlummon vein within the surface lines of its claim, and it had no right to take the said vein on its strike beyond the west line of the Compromise ground, or to take any portion of the surface of said Compromise grund, and the Court erred

in admitting in evidence over defendant's objection testimony as follows:

(a) In permitting the witness, William Mayger, to testify, as follows: "The entire vein is stoped out between the 108 and 133-foot planes, from the surface to the 190-foot level of the Montana company's works."

(b) In permitting the witness, Parks, to testify as follows: "I have block No. 1, the stope south of the north line of the Montana company's apex shaft, to the 133-foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the Compromise ground extended downward vertically. The block has an average width of 7 feet, is 21 feet long and 36.3 feet high."

Also the testimony of said witness, as shown by the record with reference to blocks 2, 3, 5, 6 and 7, all of which lie wholly within the Compromise ground, and between plaintiff's so-called 108 and 133-foot planes.

III.

The Court erred in admitting evidence, over defendant's objection, of the strike and dip of plaintiff's discovery vein as follows, to wit:

(a) In permitting the witness, Wm. Mayger, to testify that the St. Louis Discovery Vein, ran very nearly parallel with the side lines of the St. Louis, as staked; that it dipped to the east; that they had traced it to within 95 feet of the end line at the south end, and within 400 feet of the north end.

(b) In permitting the witness, Walter Proctor Jenny, to testify as follows: "I have examined the discovery

vein of the St. Louis Lode Mining Claim. Its course is substantially northeast and southwest. Explorations underground show that it lies within 750 feet of the north end line, and in the south end it is traced to within 95 feet of the end line. The dip of the vein is from vertical to a dip of 85° to 90/ easterly."

(c) In permitting the witness, John R. Parks, to testify as follows, to wit: "The discovery vein of the St. Louis is a gold-bearing fissure vein, running in the general direction of the side lines. The vein is developed both northerly and southerly from the Transcontinental tunnel."

(d) In the admission of all other testimony, shown in the record relative to the discovery vein of plaintiff's St. Louis Mining Claim, all of such testimony having been admitted over defendant's objections.

IV.

The Court erred in admitting all testimony as shown by the record, relating to ores mined by the defendant in the compromise ground, for the reason that the plaintiff was estopped by the judgment in the Specific Performance case from claiming any ore or mineral found within the surface boundaries of said compromise ground, and, particularly the Court erred in permitting the witness, William Mayger, to testify, over defendant's objection, that "The entire vein is stoped out between the 108 and 133-foot planes, from the surface to the 190-foot level of the Montana Company's works. I had Professor Parks and Mr. Keerl measure up the

stopes taken out by the defendant, and compute the number of tons that had been so taken."

(b) In admitting the testimony of Joseph Wallish over defendant's objections as follows: "I have heard the testimony of Mr. Parks, and heard him speak of testing certain samples. I was present when those samples were taken. The first sample was taken in the Montana company's apex shaft; it was taken from the northeasterly portion of the shaft."

(c) In admitting the testimony of John R. Parks, over defendant's objection, and permiting him to testify as follows: "I have block No. 1, the stope south of the north line of the Montana company's apex shaft, to the 133-foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the compromise ground extended downward vertically."

V.

The witness, William Mayger, having testified that the plaintiff had workmen on the south end of its St. Louis Claim, on Saturday, the 29th day of May, 1905, developing the foot-wall of the vein, was asked on cross-examination this question, to wit:

"If that man were at work 78 feet below corner No. 3, and there had been no foot-wall there, will you tell me the width of that apex provided the hanging-wall took the course you indicated by your ruler from the 108-foot plane crossing through the Nine Hour shaft?"

Which question was objected to by the plaintiff, and the Court erred in sustaining such objection, for the reason that the same was proper cross-examination as

tending to develop the knowledge of the witness and his interest in the litigation.

VI.

The Court erred in admitting in evidence a certain map of the St. Louis Mining Claim, and in permitting blue print copies of the same to be given to each of the jurors. The only authentication of said map being that the witness William Mayger on his redirect, upon being shown the map by counsel, testified that generally speaking it represented as far as he knew anything about it, the general situation, but that he did not know who prepared the map or the map of which it was a copy. That it was a fair enough illustration except that according to his idea, there was not so much throw of the discovery vein on the fault line, and that the two ends ought to be nearer together and that a line ought to be a little bit higher up, otherwise it was all right.

VII.

The Court erred in permitting the witness William Mayger to answer the following question relating to said map, to wit:

Q. "I will ask you if that bears a general resemblance of the general situation of the Drumlummon Mining Claim to the rest of the property?"

For that the question was leading, immaterial and irrelevant.

VIII.

The Court erred in admission of evidence offered by the plaintiff in the following instances, to wit:

(1) The witness, John R. Parks, having testified that himself and Mr. Keerl made a careful survey of the ground and accurately measured all of the stopes and cavities from which ore had been removed, was permitted to testify over defendant's objection as to ore removed between the 108 and the 133-foot planes and ore lying wholly within the surface boundaries of the Compromise Ground.

(2) The said witness having testified that he had divided the stoped ground into eleven blocks lying north of the 133-foot plane down to the 190-foot level in the defendant's ground, was required to take the blocks and tell the tonnage and value he found in each block over the objection of the defendant. For that it included blocks in the Compromise ground, which by the judgment and decree in the Specific Performance case, was found to be the property of the defendant, and because they were not within the recovery period under the pleadings in the action, in that a portion thereof at least was taken out since September 16th, 1893, and also because the recovery for ore extracted after September 16th, 1893, is limited by the supplemental pleading.

(3) The Court erred in permitting the witness Parks to testify to what he denominated Block one being the ground south of the north line of the Montana company's apex shaft to the 133-foot plane from the surface to the instrument at K. and containing 410 1/2 tons of the value of $59,522.50.

(4) The Court erred in admitting the said witness Parks to testify with reference to the cubical contents

and value of each of the blocks, numbered 2, 3, 4, 5, 6, 7, 8, 9 and 10, for the reason as already assigned.

IX.

The Court erred in not permitting the witness for the defendant, John H. Farmer, to answer the following question, to wit:

Q. "Drawing a line at right angles to that one (indicating the east line of the Compromise ground) 50 feet from the center of the discovery shaft on the Nine Hour, where would it bring it on the map, that is from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2 and 3 on the St. Louis?"

Said witness having testified that he was a mining engineer and had made the map (Defendant's Exhibit "E") about which he was testifying.

X.

The Court erred in refusing to permit the witness John Langan, William Robinson, Warren DeCamp, F. P. Sterling, John W. Eddy and Joseph K. Toole to be called to the stand, and in requiring the defendant to submit to the court in an offer of proof what it expected to establish by the testimony of each of said witnesses severally.

XI.

The Court erred in refusing to permit the defendant to call to the witness-stand, John H. Farmer and to prove by him that he had read the complaint in the Adverse Claim suit, brought by the owners of the Nine

Hour against the St. Louis claim, which complaint is referred to in the complaint in the Specific Performance case; that he knew the description therein contained and that it represented the area of 1.98 acres. That he had platted the area in conflict on the map (Defendant's Exhibit "E"), and that it included the 30-foot strip or the Compromise ground.

XII.

The Court erred in sustaining the objection made by plaintiff and in refusing to permit the defendant to prove by the witness William Robinson, present in court, that he was the person who located the Nine Hour Claim and the representative of his co-owner when the settlement of the Adverse Suit was made. That the whole area in conflict in that suit was 1.98 acres, the boundaries of which were accurately shown upon the map (Defendant's Exhibit "E"); and that all of the strip described in the bond was the easterly 30 feet of said 1.98 acres. That the instructions he received with reference to the settlement of said Adverse Claim suit from his co-owner DeCamp, was that he was to retain the right to the ore beneath the Compromise ground without regard to where the apex of the lode was, in which said ore might be contained. That it was arranged with William Mayger representing Charles Mayger, that the Nine Hour claimants were to have the 30-foot strip and, "All of the mineral therein contained" without regard to where the apex of the lode might be in which such mineral was contained. That this was the distinct understanding of the parties be-

fore the bond (Defendant's Exhibit "A") attached to its answer was drawn up. That said bond was drawn up by Messrs. Toole & Toole, who were the attorneys for William Mayger. That the witness, after said bond was drawn up, went to Joseph K. Toole with said bond and inquired of him whether the obligor in said bond could pay the penal sum named therein and avoid making conveyance of the said premises, and whether by its terms the bond gave to witness and his co-owner all of the mineral contained in said Compromise ground regardless of where the lead in which it was found might have its apex. That he knew where the east side line of the St. Louis Lode Mining Claim was prior to the time that he staked his Nine Hour Claim, and that the westerly line of the Nine Hour Claim was not within 25 feet on the south end and 50 feet on the north end of said St. Louis east side line. That after his discovery, the southeast corner stake of the St. Louis was moved up to a point near the east side line of his Nine Hour Claim, which point is correctly shown on defendant's map (Exhibit "E"). That when the St. Louis was surveyed for patent, such survey was started from its northeast corner stake and ran in the direction of the stake which had been moved to the point marked corner No. 2 on its survey, where a monument was put up, where no stake or monument had ever stood before, from which point the said side line had an angle to its corner No. 3. That the extension of said east side line of said St. Louis Claim over witness' Nine Hour Claim was wrongful and resulted in securing as a part of said St. Louis Mining Claim all of the area of said Nine Hour

Claim embraced within said line, save and except the 30-foot strip.

XIII.

The Court erred in refusing to permit the defendant to call Warren DeCamp and to establish by him that he was a co-owner in the Nine Hour Claim at the time that the Adverse Claim suit was pending; that he knew the settlement that was made and that he would not have consented thereto, but for the fact that the owners of the Nine Hour were to have the 30-foot strip, together with all of its mineral contents regardless of where the apex of the lode in which such mineral so found, might be. That he knew of the wrongful extension of the east side line of the St. Louis over the Nine Hour, made at the time of the survey for patent of said claim. That he knew where the east line of the St. Louis was as originally staked, and the west line of the Nine Hour as that claim was staked, and that there was an interval of unclaimed territory between the two lines.

XIV.

The Court also erred in sustaining plaintiff's objection to calling Frank P. Sterling, then in court, to the witness-stand and in refusing to permit the said defendant to prove by said Sterling that at the time (Defendant's Exhibit "A") attached to defendant's answer herein was drawn, he was a lawyer, was interested in said Nine Hour Claim as a co-owner, that he understood the law of apex rights, that it was distinctly understood and agreed between the owners of the Nine Hour and

of the owner of the St. Louis at the time said bond was made, that the owners of the Nine Hour should own all of the mineral contained in said 30-foot strip or Compromise ground, and that the owner or owners of the St. Louis, should not have the right to follow into such ground any lead, lode, ledge or vein having its apex within the surface boundaries of the St. Louis Claim. That the witness, William Robinson, after said bond had been drawn up, took it to Governor Joseph K. Toole to learn whether it relieved the ground known as the Compromise ground from the apex rights of the St. Louis Claim adjoining it. And that he, said Robinson, would not accept said bond until he had been so assured of said fact.

XV.

The Court erred in sustaining the objection made by the plaintiff to defendant's offer to prove by the witness John W. Eddy, that he was a co-owner in the Nine Hour Claim at the time of the settlement of the Adverse suit. That it was the distinct understanding between all of the parties to that settlement, that the Compromise ground was to be a piece of ground whose westerly line should be parallel to the lines of the St. Louis between corners numbered 2 and 3 and 50 feet distant from the center of the Nine Hour Discovery shaft. That no settlement or agreement would have been entered into by the obligees named in the said bond; but for the fact that the said obligees were to have all of the mineral contained in said ground without regard to where the apex of the vein might be in which such minerals were found.

XVI.

The Court also erred in sustaining the objection made by the plaintiff to the calling of John Langan, then in court, to the witness-stand, and in sustaining its objection made to the offer of defendant to prove by said witness that he knew where the east line of the St. Louis Claim was originally located, and where the west line of the Nine Hour was located, and that he knew that there was a vacant space of unclaimed ground between the two lines. That he knew that the easterly line of the St. Louis was wrongfully extended over the Nine Hour.

XVII.

The Court erred in refusing upon objection of plaintiff to permit the defendant to call Joseph K. Toole and in rejecting its offer to prove by said witness that the bond for a deed (Defendant's Exhibit "A") attached to its answer, was in his handwriting; that the words, "Together with all the mineral therein contained," were inserted therein because that was the agreement of the parties at the time that said bond was drawn.

XVIII.

The Court erred in refusing to receive the original bond (Defendant's Exhibit "A") attached to its answer, in evidence, the defendant offering to show that said bond was in the handwriting of Governor Joseph K. Toole, who witnessed the instrument.

XIX.

The Court erred in refusing to permit defendant to

read in evidence the original complaint, and the replication in case No. 2798, Old Series of the records of the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis & Clarke, wherein William Robinson, et al., were plaintiffs and Charles F. Mayger was defendant, being the Adverse Claim Suit referred to in the record in the Specific Performance Case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon (Defendant's Exhibit "E").

XX.

The Court erred in granting the plaintiff permission to amend the ad damnum clause of its complaint so as to change the $50,000 therein mentioned to $400,000. Such amendment not being necessary in order to make the pleadings correspond with the proof, and the same depriving the defendant of substantial rights.

XXI.

The Court erred in overruling and denying defendant's motion to direct a verdict in its favor.

XXII.

The Court erred in its charge to the jury in telling them in the preliminary portion of its charge that, "defendant's answer then contains affirmative allegations which are not important in this trial and therefore no further reference is made thereto."

XXIII.

The Court erred in its charge in giving to the jury its

instruction numbered 5, which said instruction is as follows, to wit:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a prima facie case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and the 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this prima facie case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

XXIV.

The Court erred in charging the jury as in its instruction No. 8, which said instruction is as follows, to wit:

"If you find that the course of strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location, And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis Claim, between the 520 and the 133-foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said

claim, but it is sufficient to give such rights if the discovery vein, in its course or strke, passes through the ground within the St. Louis Claim between said planes generally lengthwise of the claim."

XXV.

The Court erred in its charge to the jury in giving its instruction No. 17, which is as follows, to wit:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock and ore, within the planes belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injury it has sustained."

XXVI.

The Court erred in its charge to the jury in giving to the jury its instruction No. 18, which said instruction is as follows, to wit:

"The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the

moneys expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant, or any salaries paid to its officers, or any wages to any person, except those actually employed and engaged in the extraction, transportation and milling of the ores in question."

XXVII.

The Court erred in its charge to the jury in giving its instruction No. 19, which is as follows, to wit:

"When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it was a trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would

have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis Claim and the ore extracted therefrom."

XXVIII.

The Court erred in its charge to the jury in giving to said jury its 20th instruction, which is as follows, to wit:

"If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and the 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by the misconduct of defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find from the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff, as to the amount and value of the ore extracted, if you believe such evidence is worthly of credence."

XXIX.

The Court erred in its charge to the jury in giving to said jury its 21st instruction, which is as follows, to wit:

"As to the evidence disclosed by the books of defendant and the abstract thereof, offered in evidence in behalf of defendant, I charge you that to entitle them to be considered as sufficient evidence to prove the value

of the ore extracted from the Drumlummon vein, you must be satisfied that the ores taken from other parts of defendant's mine, which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition."

XXX.

The Court erred in giving to the jury its 23d instruction, which is as follows, to wit:

"The law is well settled that if one willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value of which the property in question can be reasonably estimated."

XXXI.

The Court erred in its charge to the jury by giving to the jury its instruction No. 32, which is as follows, to wit:

"In considering any ore extracted from Block 8, part of which was removed under the authority of this Court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the

plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed you should make a deduction in accordance with the general rules laid down in the charge."

XXXII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. 1.

"The defendant having heretofore and on or about the 1st day of June, A. D. 1895, recovered a judgment and decree against the above-named plaintiff in the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein and in the evidence before you. And it not appearing from the testimony herein, that said judgment, in so far as it awards all of the mineral contained in the Compromise ground to the defendant herein, has been, or was at any time modified, reversed or so restricted in its meaning, as to apply only to such mineral as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said Compromise ground, and, it appearing further, that in and by said judgment and decree, the plaintiff herein was forever barred from all interest or claim to said Compromise ground, or to any part or portion thereof or to the possession thereof, or, of the mineral or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff

as to any and all mineral contained in said Compromise ground, whether the leads, lodes or veins wherein such mineral is found, have, or have not their apices within the surface boundaries of the plaintiff's St. Louis Claim or otherwise, and as for all alleged trespasses in said Compromise ground, you will not take the same into your consideration or return any verdict therefor.

The Court instructs you that in order to entitle a miner to follow a vein or lode, having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of such top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon Lode within its surface boundaries. The Court therefore instructs you that as between these two planes, the plaintiff would not have the right to follow this vein on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and the 133-foot planes."

XXXIII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. II, which said instruction is as follows, to wit:

"It appearing that in and by the bond for a deed, a copy whereof is annexed to the defendant's answer herein, and by the judgment rendered on or about June 1st, 1895, in the District Court of the First Judicial District of the State of Montana, in and for the county of

Lewis & Clarke, in an action wherein the predecessor in interest of the defendant herein was plaintiff and the plaintiff herein was defendant, the plaintiff herein was precluded from asserting any right, title, or interest in and to the Compromise ground, or to any and all mineral therein contained, the said plaintiff had neither the actual nor constructive possession of the ground in which the trespasses complained of are alleged to have been committed and is, therefore not entitled to recover in this action. You are therefore instructed to return a verdict for the defendant."

XXXIV.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XII, which said instruction is as follows, to wit:

"It is alleged in the answer in this case that a judgment was duly rendered and given on or about the 1st day of June, A. D. 1895, in an action then pending in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of the plaintiff by its replication filed in this action, that such judgment was rendered, but, it is alleged that it was confined to such mineral, and such mineral only, as was or is found in leads or lodes having their tops or apices wholly

within the surface boundaries of the said Compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the Compromise ground was distinctly in issue in that case, as appears by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of the plaintiff's right to recover, for any and all ores which you may find that the defendant has mined within the surface boundaries of the Compromise ground extended downward vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff."

XXXV.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XVI, which said instruction is as follows, to wit:

"The section of the Mineral Land Act which grants to the owner of a mining claim the right of extralateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course, beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis Claim, introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right

on the Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of the defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral right, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein, and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

XXXVI.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XIX, which said instruction is as follows, to wit:

"The burden of proof in this case is on the plaintiff, and unless you find from a preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, than your verdict should be for the defendant."

XXXVII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXI, which said instruction is as follows, to wit:

"As I have already explained to you, plaintiff's extralateral rights on the Drumlummon vein, where the same is found within surface boundaries of its St. Louis Claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to on its discovery vein, should that

vein in its course downward on its dip extend to and under the surface boundaries of the Nine Hour Claim. The law does not contemplate that the owner of a mining claim shall have a greater length of vein beneath the surface than he has length of apex of the vein on the surface. For illustration, suppose that the plaintiff in this case, had only one hundred feet of the apex of its St. Louis Claim within the surface boundaries of its claim, and that it was so situated, with reference to the Nine Hour Claim, that on its dip downward and under the surface of that clam it would have extralateral rights; then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour Claim.

Applying these principles to the case at bar, the Court instructs you that if you should find from a preponderance of the testimony that the vein in the sixty-five-foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis Claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis Claim and are practically coterminous therewith. To illustrate what I mean, suppose you should find that at the northerly end of the discovery vein of the St. Louis, it terminates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its sixty-five-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or

strike of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights on the Drumlummon vein. Then should you further find, from a preponderance of the testimony, that plaintiff's discovery vein on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein, will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis Clam."

XXXVIII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXIII, which said instruction is as follows, to wit:

"If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence, that such vein continues on its course through its St. Louis Claim, and passes out of the south end line of its claim, or practi-

cally does so. If you should find from the evidence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sixty-five-foot drift is found, but that it only extends into the wall of the tunnel for a few feet and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as practically the southerly end of plaintiff's said discovery vein, and your verdict should be for the defendant."

XXXIX.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVI, which said instruction is as follows, to wit:

"The Court instructs you that your first duty is to examine and ascertain what, if any extralateral rights attach to the discovery vein of plaintiff's St. Louis Claim. In the first place you must ascertain which of the surface lines, are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them out on the ground, or named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from the evidence that the discovery vein of the St. Louis Claim was in what has been denominated the 65-foot shaft, and that the vein therein discovered, on

its course or strike through the claim, would pass out of the surface boundaries of the St. Louis, between corners numbered one and two thereof, and that following said course in a southwesterly direction, it would pass out of the westerly boundary of the said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so, because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered, and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights of the Drumlummon vein, or on so much of it as has its apex inside the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extralateral rights within or under the Nine Hour Claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all of the Drumlummon lode found within their surface boundaries, but they could not pursue on its dip an inch beyond the easterly line of the St. Louis claim, extended downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extralateral rights

under the Nine Hour Claim, it is plaintiff's misfortune, and one which neither this Court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein, and not across it."

XL.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVIII, which said instruction is as follows, to wit:

"It conclusively appears by the testimony in this case, and it is an undisputed fact that the Compromise ground or the 30-foot strip, as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim. The Court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis Claim was first located and first patented. Having been patented as a part of the St. Louis, the Compromise ground is to be regarded as standing exactly on the same plane, so far as priority is concerned, with every other part of the St. Louis Claim."

XLI.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXXII, which said instruction is as follows, to wit:

"Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and after-

ward deeded to the defendant company or its predecessor, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis Claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis Claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging-wall and that there can be no recovery in this case for any ores extracted south of the 108-foot plane."

XLII.

The Court erred in giving to the jury its instruction No. 7, which said instruction is as follows, to wit:

"It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis quartz lode mining claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence; but the defendant insists that the St. Louis quartz lode

mining claim is not entitled to extralateral rights on the Drumlummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary or incidental vein of the St. Louis Claim. Under the Statutes of the United States, the locators of a mining claim have the exclusive right of possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. These extralateral rights, under the decisions of the Supreme Court of the United States, as to the secondary or incidental veins, are the same as those given by the statute upon original or discovery veins; and if, therefore, plaintiff had extralateral rights upon its discovery vein, including that portion of the St. Louis Claim within the above planes in which is found the apex of the Drumlummon vein, so called, then plaintiff has extralateral rights upon that part of the Drumlummon vein. Plaintiff claims that the original or discovery vein of the St. Louis Claim runs through the earth beneath the surface of said claim in the general course of the side lines of said claims. If you find from the evidence that the original or discovery vein of the St. Louis Claim, on its course or strike, passes through the earth within the limits of its surface boundaries,

between the 520 and the 133-foot planes, on a general course lengthwise of the claim, then plaintiff has extralateral rights to such parts of the original discovery vein between said planes, and would have corresponding extralateral rights upon any secondary or incidental veins having their apexes in the St. Louis Claim between said planes.

XLIII.

The Court erred in giving to the jury its instruction No. 9, which said instruction is as follows, to wit:

"And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) run lengthwise of the St. Louis Claim between its side lines and extend from the 520 to the 133-foot planes, and dip easterly, then plaintiff would be entitled to extralateral rights for that vein (or those veins) and to the like extralateral rights for all other veins having their apices within the same limits, and running in the same general direction."

XLIV.

The Court erred in giving to the jury its instruction No. 11, which said instruction is as follows, to wit:

"There are two rules established and adopted by the Federal and other courts of the United States with reference to the measure of damages in cases of this kind, and which rule applies, depends upon whether or not the trespass under which the ore was extracted, was willfully committed or done in good faith. If you find from the evidence that the defendant entered on that part of the said Drumlummon vein which apexes

in the St. Louis quartz lode mining claim, between the planes aforesaid, and extracted the said ore therefrom willfully, recklessly and with knowledge that said vein did apex within the said St. Louis Claim, then your verdict must be for the value of the ore which you must determine from the evidence introduced. If, however, the defendant had sufficient reason to believe, and did honestly believe at the time it entered upon said vein and extracted and removed said ore, that the same belonged to said defendant and not to the plaintiff, and that it had lawful right and authority to extract and remove the same, then the trespass was not willful and the plaintiff is entitled to the value of the ore, subject to the deduction for the reasonable cost of mining of said ore, hoisting the same to the surface, transporting the same to reduction works and the reasonable cost of such reduction. The actual cost to the defendant of all, or any of those items is not conclusive upon the value thereof. Defendant is not entitled to reduce the value of the ore by any sum greater than the reasonable value of the items above mentioned, and you must determine such reasonable value from the evidence given in the case. In determining the character of the trespass, you have the right to disregard all testimony given by the defendant tending to establish good faith, if, in your judgment, the action of the defendant discloses to your satisfaction that the claim of defendant, that it acted under an honest belief that it owned the ore in question and had a right to remove it, was merely for the purpose of reducing the damages which it would have to pay for such ore upon a suit to re-

cover the value thereof by this plaintiff, and find that the action of defendant in extracting and removing the ore in question was willful."

XLV.

The Court erred in giving to the jury its instruction No. 14, which said instruction is as follows, to wit:

"The burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value; and in arriving at a verdict, you are to take into consideration all of the circumstances and facts presented by the evidence in the case. However, if you are satisfied that the plaintiff has shown its ownership, and given evidence tending to show the amount of ore extracted and the value thereof, the burden is upon the defendant to show if it can, that the trespass complained of was not willful. A presumption arises from the extraction of the ore from a vein which has its apex within the plaintiff's mining claim, by the defendant, that the trespass was willful and that the defendant is liable for the value of the ore taken from the mine. This presumption is, however, disputable, and the burden is upon the defendant to show in mitigation of damages that it was not a willful trespasser and thus be relieved from payment of the value of the ore as stated in other instructions herewith given to you."

XLVI.

The Court erred in giving to the jury its instruction No. 15, which said instruction is as follows, to wit:

"If you find that the defendant has prevented the plaintiff from ascertaining the exact amount of the ore or its value, by extracting and removing the same, or has placed it beyond the power of the plaintiff to make such proof certain and specific, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by his conduct by making every reasonable intendment against him in favor of the party injured."

XLVII.

The Court erred in giving to the jury its instruction No. 16, which said instruction is as follows, to wit:

"In estimating the damages to the plaintiff, if you find from the evidence that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by extracting the greater part of the ore, or all of the valuable ore in any particular places of the mine, or by mixing the ore taken from plaintiff's ground with ore of less value, belonging to defendant, or with any other material taken from any other places in the mine, then the jury, in determining the value of the ore taken, are at liberty to consider the highest value of ore found in the vicinity of the ore extracted."

XLVIII.

The Court erred in requiring the defendant to submit its exceptions to the charge of the Court, in writing, before the going out of the jury, and in the presence of the jury, the same being contrary to Rule No. 58 which is as follows, to wit:

Exceptions to a charge to a jury, or to a refusal to

give as a part of such charge instructions requested in writing, may be taken by any party by stating to the Court after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same.

XLIX.

The Court erred in inserting into the defendant's bill of exceptions on the settlement thereof, the exceptions in writing "hastily made and filed" before the going out of the jury, the same not having been proposed as an amendment by the plaintiff to defendant's proposed bill of exceptions.

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The Court erred in refusing to allow the exceptions to the charge of the Court given to the jury, as in defendant's proposed bill of exceptions and in confining the exceptions of the defendant to the exact language used by it in the written exceptions filed before the retirement of the jury.

Wherefore, the said Montana Mining Company, Limited, plaintiff in error, prays that the judgment of the Circuit Court of the United States, for the District of Montana, be reversed and that the said Circuit Court be directed to enter an order setting aside the verdict

and judgment herein and dismissing the said cause of action.

W. E. CULLEN,
WM. WALLACE, Jr., and
W. E. CULLEN, Jr.,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 291. Title of Court and Cause. Assignment of Errors. Filed and entered August 21, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 21st day of August, A. D. 1905, the defendant herein, filed its petition for a Writ of Error and Order Allowing Same, which is in the words and figures as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED,
Defendant.

## Petition for Writ of Error.

The Montana Mining Company, Limited, the defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered in

the above-entitled action on the 7th day of July, A. D. 1905, comes now by W. E. Cullen, Wm. Wallace, Jr., and W. E. Cullen, Jr., its attorneys, and petitions the court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which it shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

WM. WALLACE, Jr.,
W. E. CULLEN,
W. E. CULLEN, Jr.,
Attorneys for Defendant.

Aug. 21, 1905.

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED,
Defendant.

**Order Allowing Writ of Error.**

Upon the motion of Messrs. W. E. Cullen, Wm. Wallace, Jr., and W. E. Cullen, Jr., attorneys for the defendant, and upon the filing a petition for writ of error and assignment of errors:

It is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at $212,000, and that said bond, when so given and approved by the Court shall operate as a supersedeas.

WM. H. HUNT,
Judge.

Aug. 21st, 1905.

[Endorsed]: No. 291. (Title of Court and Cause.) Petition of Defendant for Writ of Error and Order Allowing the Same. Filed and entered August 21, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 24th day of August, A. D. 1905, defendant filed its bond on writ of error herein, as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED,
Defendant.

**Bond on Writ of Error.**

Know all men by these presents, that we, the Montana Mining Company, Limited, a corporation duly organized under the laws of Great Britain, and doing and entitled to do business in the State of Montana, as principal, and the Union Bank and Trust Company, a corporation organized under the laws of the State of Montana and qualified to be a surety on judicial bonds, are held and firmly bound unto the plaintiff, the St. Louis Mining and Milling Company of Montana, a corporation duly organized under the laws of the State of Montana in the full and just sum of two hundred and twelve thousand ($212,000.00) dollars to be paid to the said St. Louis Mining and Milling Company of Montana, its certain

attorneys or assigns, to which payment well and truly to be made we bind ourselves, our successors and our assigns and each of them jointly and severally and firmly by these presents.

Sealed with our seals and dated this 22d day of August, A. D. 1905.

Whereas, lately at a Circuit Court of the United States for the Ninth Circuit, District of Montana, in a suit pending in said court between the said St. Louis Mining and Milling Company of Montana, plaintiff, and the said Montana Mining Company, Limited, as defendant, a judgment was rendered against the said Montana Mining Company, Limited, and the said Montana Mining Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said St. Louis Mining and Milling Company of Montana, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, in said Circuit, on the 23d day of September next.

Now, the condition of the above obligation is such that if the said Montana Mining Company, Limited, shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make the said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

And the above-named surety, the Union Bank and Trust Company, does hereby covenant and agree to and

with the said St. Louis Mining and Milling Company of Montana, that in case of a breach of any condition in the foregoing bond, this court may, upon notice to it of not less than ten days, proceed summarily in the action or suit in which the same is given, to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it and award execution thereon.

MONTANA MINING COMPANY, LIMITED.

By ALEX. BURRELL,

General Manager.

UNION BANK AND TRUST COMPANY.

By GEO. L. RAMSEY,

President.

[Seal] Attest: C. F. MORRIS,

Secretary.

Sealed and delivered in the presence of:

S. McKENNAN.

P. O. WELLS.

Approved by:

WILLIAM H. HUNT,

United States District Judge.

[Endorsed]: No. 291. (Title of Court and Cause.) Bond. Filed and entered August 24, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

## Writ of Error.

The United States of America, }
Ninth Judicial Circuit. } ss.

The President of the United States, to the Honorable Judges of the Circuit Court of the United States for the Ninth Circuit, District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, or some of you, between the St. Louis Mining and Milling Company of Montana, plaintiff, and the Montana Mining Company, Limited, defendant, a manifest error hath happened to the great damage of the said Montana Mining Company, Limited, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, in said Circuit, on the 23d day of September next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and accord-

ing to the laws and customs of the United States should be done.

WILLIAM H. HUNT,
United States District Judge.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 24th day of August, A. D. 1905, the one hundred and thirtieth year of the Independence of the United States of America.

[Seal] Attest: GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

Service of the above writ of error accepted this 24th day of August, A. D. 1905.

BACH & WIGHT,
M. S. GUNN, and
J. B. CLAYBERG,
Attorneys for Plaintiff.

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## Return to Writ of Error.

The answer of the Judges of the Circuit Court of the United States for the District of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said court, to the United States Circuit Court of Appeals for the Ninth Circuit within mentioned, at the day and

place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

[Endorsed]: No. 291. In the Circuit Court of the United States, Ninth Circuit, District of Montana. St. Louis Mining and Milling Co. of Montana, Plaintiff, vs. Montana Mining Co., Limited, Defendant. Writ of Error. Filed and entered Aug. 24, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

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## Citation.

*The United States Circuit Court of Appeals, for the Ninth Circuit.*

The United States of America, } ss.
Ninth Judicial Circuit. }

To the St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, in said Circuit, on the 23d day of September next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Ninth Circuit, District

of Montana, wherein the Montana Mining Company, Limited, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 21st day of August, A. D. 1905, the one hundred and twenty-ninth year of the Independence of the United States of America.

WILLIAM H. HUNT,
United States District Judge.

We hereby this 24th day of August, A. D. 1905, accept due personal service of this citation on behalf of the St. Louis Mining and Milling Company of Montana, the defendant in error.

BACH & WIGHT,
M. S. GUNN, and
J. B. CLAYBERG,
Attorneys for Defendant in Error.

[Endorsed]: No. 291. In the Circuit Court of the United States for the Ninth Circuit, District of Montana. St. Louis Mining and Milling Company of Montana, Plaintiff, vs. Montana Mining Company, Limited, Defendant. Citation. Filed and entered Aug. 24, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

## Clerk's Certificate to Transcript.

United States of America,
District of Montana. } ss.

I, George W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, that the foregoing volume, consisting of two hundred and forty-one (241) pages, numbered consecutively from one to two hundred and forty-one (241), is a true and correct transcript of the pleadings, process, records, orders, judgment, and all proceedings had in said cause and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause with admission of service thereof.

I further certify that the cost of the transcript of record amounts to the sum of one hundred and eight and 65/100 dollars ($108.65), and has been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court at Helena, Montana, this 25th day of August, A. D. 1905.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

[Endorsed]: No. 1240. United States Circuit Court of Appeals for the Ninth Circuit. The Montana Mining Company, Limited, Plaintiff in Error, vs. The St. Louis Mining and Milling Company of Montana, Defendant in Error. Transcript of Record. Error to the Circuit Court of the United States for the District of Montana.

Filed September 1, 1905.

F. D. MONCKTON,
Clerk.

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## Exhibit "Patent."

General Land Office. No. 12338.

Mineral Certificate. No. 1245.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the Plat and Field Notes of survey and the Certificate, No. 1245, of the Register of the Land Office at Helena, in the Territory of Montana, accompanied by other evidence, whereby it appears that Charles F. Mayger did, on the twenty-first day of August, A. D. 1885, duly enter and pay for that certain mining claim or premises, known as the St. Louis lode mining and mill-site claim, designated by the Surveyor General as Lots Nos. 54 and 55A and 55B, embracing a portion of townships eleven and twelve north of ranges six west of the

principal meridian, in the Mining District, in the County of Lewis and Clarke, and Territory of Montana, in the District of Lands subject to sale at Helena, and bounded, described and platted as follows, with magnetic variation as hereinafter stated.

Beginning for the description of the lot Nos. 54 and 55A, at corner No. 1, a granite stone 16x12x12 inches, marked 1 M. C. 54, a mound of stones alongside, from which the quarter section corner on the south boundary of section thirty-six, in township twelve north of range six west of the Principal meridian, bears south seventy-four degrees and fifteen minutes east three hundred and fifty-three feet distant.

Thence, first course, magnetic variation nineteen degrees east, south twenty-one degrees and fifteen minutes west one hundred and two feet intersect line between townships eleven and twelve north of range six west, a granite stone 15x14x12 inches, marked 54. M. C. 55 A; four hundred and fifty feet to a point, from which a shaft bears north sixty-seven degrees west two hundred and eighty-five feet distant, and from said shaft an open cut 3 by 5 feet, one hundred feet long, runs south fifty-four degrees east; six hundred and fifty-five feet to a point, from which a shaft bears west one hundred and fifty-three feet distant; one thousand and ninety-seven feet to corner No. 2, a slate stone 20x12x5 inches, marked 2 M. C. 55A, a mound of stones alongside, from which the center of discovery shaft bears north thirty-five degrees and thirty minutes, west two hundred and eighty-nine feet distant.

Thence, second course, magnetic variation nineteen degrees east, south fifty-one degrees and thirty minutes west four hundred and three feet to corner No. 3, a slate stone 14x10x4 inches, marked 3 M. C. 55A, a mound of stones alongside, from which the southeast location corner bears south ten degrees east four hundred and thirty-five feet distant.

Thence, third course, magnetic variation nineteen degrees east, north forty-five degrees and thirty minutes west six hundred feet to corner No. 4, a granite stone 20x8x7 inches, marked 4 M. C. 55A, a mound of stones alongside, from which the southwest location corner bears south seventy-nine degrees west one hundred and eighty-two feet distant.

Thence, fourth course, magnetic variation nineteen degrees east, north fifty-one degrees and fifteen minutes east four hundred and twenty-five feet to corner No. 5, a granite stone 16x12x6 inches, marked 5 M. C. 55A, a mound of stones alongside.

Thence, fifth course, magnetic variation nineteen degres east, north twenty-one degrees and forty-five minutes east five hundred and twenty-nine and seven-tenths feet intersect said township line, a granite stone 18x14x7 inches, marked 55A, 54 M. C., one thousand and sixty-nine feet to corner No. 6, a granite stone 18x12x6 inches, marked 6. M. C. 54, from which a fir tree thirteen inches in diameter marked 6 M. C. 54 B. T. bears north fifteen degrees east twenty-four feet distant, and a pine tree five inches in diameter marked 6 M. C. 54 B. T. bears south fifty-four degrees east twenty-one and five-tenths feet distant.

Thence, sixth course, magnetic variation nineteen degrees east, south forty-five degrees and thirty minutes east five hundred and fifteen and five tenths feet to corner No. 1 of lot No. 40, the Drumlummon lode claim; five hundred and seventy-nine feet to corner No. 1, the place of beginning; said lot Nos. 54 and 55A extending one thousand five hundred feet in length along said St. Louis vein or lode, the granted premises in said lot containing eighteen acres and ninety-three hundredths of an acre.

Beginning for the description of the lot No. 55B, at corner No. 1, a granite stone 18x12x6 inches, marked 1 M. C. 55B, a mound of stones alongside, from which corner No. 4 of lot No. 55A, hereinbefore described, bears south thirty-five degrees and nine minutes east four hundred and ninety-eight and seven tenths feet distant.

Thence, first course, magnetic variation nineteen degrees east, north twenty-seven degrees east two hundred and ninety-five feet to corner No. 2, a granite stone 14x12x12 inches, marked 2 M. C. 55B, a mound of stones alongside.

Thence, second course, magnetic variation nineteen degrees and thirty minutes east, north sixty-eight degrees and forty-five minutes west two hundred and thirty-one feet to corner No. 3, a granite stone 18x14x5 inches, marked 3 M. C. 55B, a mound of stones alongside, from

which the northwest location corner bears north thirty-degrees east sixteen feet distant.

Thence, third course, magnetic variation nineteen degrees and thirty minutes east, south thirty-one degrees and thirty minutes west two hundred and thirty feet to corner No. 4, a granite stone 18x12x8 inches, marked 4—55B and 3—37 M. C.—38, a mound of stones alongside, being also corner No. 26 of lot Nos. 37 and 38, a placer claim, and corner No. 3 of lot No. 37B, a millsite claim, from which corner No. 1 of this claim, bears south fifty-three degrees and thirty minutes east two hundred and fifty-one feet distant.

Thence, fourth course, magnetic variation nineteen degrees and thirty minutes east, south forty-two degrees west two hundred and sixty feet to brook; three hundred and twenty feet said brook; five hundred and twenty feet said brook; five hundred and ninety-six feet to corner No. 5, a granite stone 18x14x5 inches, marked 5 M. C. 55B, a mound of stones alongside.

Thence, fifth course, magnetic variation nineteen degrees and thirty minutes east, south thirty-seven degrees and forty-five minutes east thirty-three feet brook; two hundred and five feet to corner No. 6, a granite stone 16x10x6 inches, marked 6 M. C. 55B, a mound of stones alongside, from which the southeast location corner bears south forty-three degrees and thirty minutes west forty-five feet distant.

Thence, sixth course, magnetic variation nineteen degrees and thirty minutes east, north forty-six degrees and fifteen minutes east six hundred and fifty-eight feet to corner No. 1, the place of beginning, cotnaining four acres and sixty-eight hundredths of an acre, which together with the area embraced in the granted premises in said lot Nos. 54 and 55A aggregates twenty-three acres and sixty-one hundredths of an acre of land, more or less, as represented by yellow shading on the following plat.

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Lot No 55B
T11N. R6W
(Unsurveyed)
Scale of 200 feet to an inch.

Now know ye, That there is therefore hereby granted by the United States unto the said Charles F. Mayger, and to his heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, all that portion of the said St. Louis vein, lode,or ledge, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which are inside of the surface boundary lines of said granted premises in said Lot Nos. 54 and 55A extended downward vertically, although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises: Provided, That the right of possession to such outside parts of said veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot Nos. 54 and 55A, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes, or ledges: And provided further, That nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to his heirs and assigns forever; subject, nevertheless to the above-mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor

of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Third. That in the absence of necessary legislation by Congress, the Legislature of Montana may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, GROVER CLEVELAND, President of the United States of America, have caused these letters to be made patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the twenty-second day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and of the

Independence of the United States the one hundred and twelfth.

By the President:

[Seal] GROVER CLEVELAND.

By M. McKEARR,

Secretary.

ROBT. W. ROSS,

Recorder of the General Land Office.

Recorded Vol. 151, Pages 358 to 364, inclusive.

Examined.

No. 286A. United States Patent, No. 3, for Charles F. Mayger.

State of Montana,
County of Lewis and Clarke, } ss.

I hereby certify that the within instrument was filed in my office on the 5th day of Dec. A. D. 1889, at 55 min. past 4 o'clock, P. M., and recorded on page 302 of Book 1, of the U. S. Records of Lewis and Clarke County, Montana Territory.

J. S. TOOKER,

County Recorder.

By F. W. Coombs,

Deputy.

Fees, $7,50, pd.

Filed May 8th, 1893. Geo. W. Sproule, Clerk.

Filed Sept. 28, 1893. Geo. W. Sproule, Clerk.

Plffs. Ex. 11. Filed June 15, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

No. 1240. United States Circuit Court of Appeals for the Ninth Circuit. Exhibit "Patent." Received Sept. 1, 1905. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

No. 1240.

IN THE

# United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.



ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA.

CHARLES J. HUGHES Jr.,
WILLIAM WALLACE Jr.,
W. E. CULLEN,
W. E. CULLEN Jr.,
*Attorneys for Plaintiff in Error.*

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## STATEMENT OF FACTS.

This cause has been in this Court on a former writ of error, and is found reported in 102 Fed. 430, wherein a judgment was rendered in this Court affirming a judgment rendered in the Circuit Court of the District of Montana, in favor of the said defendant in error, and against the plaintiff in error herein, for the sum of Twenty-three Thousand, Two Hundred and Nine ($23,209.) Dollars. On the former trial, the defendant in error

being dissatisfied with the verdict rendered, sued out a writ of error, and the case upon this writ of error is again found reported in 104 Fed. 664. Upon this writ of error the judgment of the lower court was, in terms, reversed, and the same was to have been remanded to the Circuit Court for a new trial, as to the right of the St. Louis Company to recover for all damages by them sustained by reason of ores mined out by the Montana Company, between what it terms its 108 and 133 foot planes. Thereupon the Montana Company sued out a writ of error to the Supreme Court of the United States from both of the orders herein made against it, as above stated, and the case is reported in 186 U. S. p. 24. The Supreme Court construed the judgment rendered by this Court, on the St. Louis Company's writ of error, as being an absolute reversal of the judgment of the lower court, and therefore held that, there being no final judgment, it was without jurisdiction to hear it, and thereupon dismissed the writ of error.

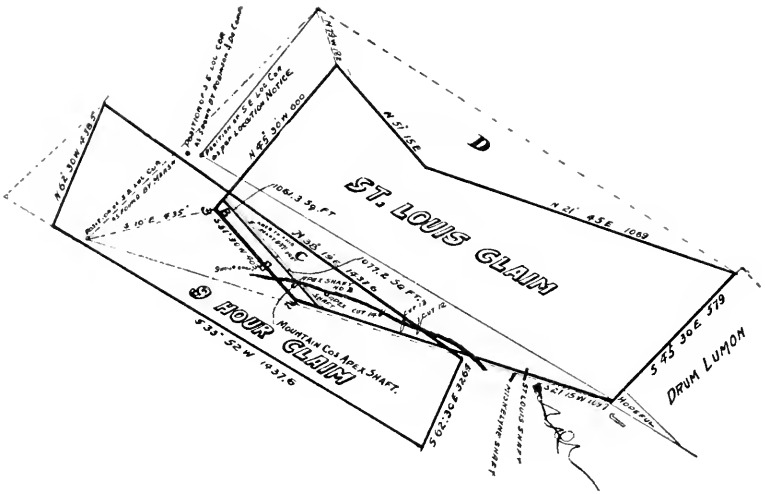
On the filing of the mandate from the Supreme Court a petition was filed in this Court on behalf of the Montana Company, praying for the issuance of a single remittitur in the cause, and this petition came on to be heard on the 6th day of October, 1902. Thereupon, and on the 8th day of the same month, this Court entered another judgment in said cause, which after reciting the former judgments entered, concludes as follows:

> "It is now ordered and adjudged, that the judgments so heretofore made and entered herein be VACATED AND SET-ASIDE, and that in lieu thereof, it is ordered and adjudged that the judgment of the

said Circuit Court in this cause be, and the same is hereby, reversed with costs, and the causes remanded to said Circuit Court for a new trial."

The remittitur sent down by the clerk of this Court, commanded that such new trial be had in the cause in accordance with the judgment of this Court filed and entered on the 8th day of October, A. D. 1902 and as according to right and justice, and the law of the United States, ought to be had. Notwithstanding this clear injunction to the Circuit Court to try the case *de novo,* and as if the two former judgments in this case had not been had, the lower court on its retrial adhered strictly to the facts and the law, as found determined in the two opinions in question, which had been vacated and set-aside as already stated. The court therefore refused to pass independently upon any question of law arising during the trial, but held, as to all questions considered in either of said opinions that the determination of the question by this court was absolutely final. In other words, the Court below held, that notwithstanding the two judgments had been revoked and set-aside, the opinions rendered were nevertheless, "the law of the case."

The subjoined diagram may give a clearer idea of the relative situation of the two claims and of the ground in controversy. It is taken from a photograph of the defendant's surface map, marked (Defendant's Exhibit "E".) and was introduced in evidence on the re-trial of the case.




A. Nine Hour Discovery Shaft.

B. Compromise Ground between Corners Nos. 2 and 3 of St. Louis Claim.

C. Original conflict between Nine Hour and St. Louis.

D. St. Louis as described in its Location Notice.

When this case was before this Court on the former hearing, our contention was that the rights of the parties were absolutely concluded and determined by the bond for a deed, attached to our answer as Exhibit "A", by the judgment and decree in the action brought to enforce the specific performance of the bond, and by the deed for the Compromise Ground which the St. Louis Company was compelled to execute, in obedience to the decree which we obtained against it. The bond stipulated for the conveyance to William Robinson and his assigns of the thirty foot strip paralled to the east side line of the St. Louis Claim between corners numbered 2 and 3, generally called the Compromise Ground, "together with all

the mineral therein contained." The ownership of the mineral was distinctly in issue in the suit brought to enforce this bond, and the decree commanded the St. Louis Company to execute a deed to us, not only for the ground itself, but for its mineral contents, as a distinct portion of the property which was to be conveyed. By reference to the deed ordered to be made, it will readily be seen the mineral was a part of the property conveyed, and was contained in the description clause of the deed, and was not simply a part of the general *habendum* and *tenendum clause* usually found in the mining deed.

The principal controversy in the Specific Performance Case having been over the right to the mineral, and the whole of it contained in the Compromise Ground, and that case having been appealed to the Supreme Court of the State and there affirmed, (See 23 Mont. 311) and afterward carried by appeal to the Supreme Court of the United States and again affirmed (See 171 U. S. 650), we had supposed that the right of the plaintiff in error to all ore in the Compromise Ground was forever settled and set at rest, as between these parties. This conclusion received added strength from the fact that the second conclusion of law as found by the Court, and the judgment rendered therein, was a perpetual injunction barring the St. Louis Company from all interest or claim to the said premises or to any part or portion thereof, or the possession of the same or any thereof. But your Honors held that to give this phraseology, the effect which we were claiming for it, the words of the contract (i. e. bond)

would, under the circumstances, need to be clear and explicit, and, that the words, "*together with all the mineral therein contained,*" were not sufficient. You had previously stated the rule that should govern the interpretation of this contract, was to ascertain what was the intention of the parties at the time when it was made, and that when such intention was ascertained, it was controlling. For the purpose of showing what were the circumstances surrounding the parties at the time of the execution of the bond, defendant had caused to be subpoened as witnesses, William Robinson, the discoverer of the Nine Hour Claim, Frank P. Sterling, Warren DeCamp and others to show the exact facts and circumstances attending the execution of said bond. That there was between the west side line of the Nine Hour and the east side line of the St. Louis, as the same were originally located, a clear strip of unclaimed territory, approximately 25 feet in width at one end and 50 feet at the other; that the southeast corner stake of the St. Louis Claim had been surreptitiously removed from its original position, to a point well up toward the east side line of the Nine Hour; that when the St. Louis Claim was surveyed for patent, the survey started from the northeast corner stake of the St. Louis, which stake had not been moved, and was run in a direct line for the stake which had been wrongfully placed up on the Nine Hour Claim, and which was marked, "southeast corner of St. Louis Mining Claim;" that said line was continued in the same direction until it reached corner No. 2 of the St. Louis

Claim, where a monument was erected to mark said corner, and no stake, monument or corner of any kind had ever been there before; that the line between corner numbered 2 and 3 of the St. Louis survey came within 10.6 feet of the center of the Nine Hour Discovery Shaft. That if the line between corner 1 and 2 had been continued in its own direction, it would have included within the surface boundaries of the St. Louis, the Nine Hour Discovery Shaft; that the area of the Nine Hour surface thus wrongfully included in the St. Louis surface boundaries was 1.98 acres; that as originally staked, there was not a foot of the Drum Lummon vein within the surface boundaries of the St. Louis Claim, and that by the wrongful extension of its eastern side line as aforesaid, it got approximately 600 feet of the apex of that vein within its boundaries; that at the time of and prior to the execution of the bond, it was distinctly understood and agreed that the west line of the Compromise Ground was to be an absolutely vertical line, and that all east of it, was to belong to the Nine Hour, and all west of it to the St. Louis; that it was distinctly agreed between the parties before the execution of said bond, that the owners of the Nine Hour Claim were to have all of the mineral found to the eastward of said line without regard to where the apex of the vein might be in which said mineral was found; that all of the parties, both obligor and obligees, agreed that the words, "together with all the mineral contained therein," effected this purpose; and that but for this, and but for his belief that these words con-

veyed to him and his co-owners absolutely, every ounce of mineral contained in said ground, the said William Robinson would not have accepted said bond, and would not have dismissed his Adverse Suit and proceedings in the United States Land Office. The Court below would not permit this proof to be made, holding that the language, "together with all of the mineral therein contained," had been construed by this Court in the opinion found in the 102 Fed. Reporter, and were therein found to be meaningless, neither adding to nor taking away anything from the bond, and that the proof offered was therefore irrelevant and immaterial.

Another new feature of the case, not developed on the former trial, is the course or strike and the dip of the Discovery Vein of the St. Louis. It is conceded that the discovery point of the St. Louis was at what it denominated the sixty-five foot shaft, and that the vein therein shown is the discovery vein. The overwhelming preponderance of the proof is that this vein passes out of what is denominated the east side line of the St. Louis Claim at a point near where the plaintiff draws down its 520 foot plane, and at the other end it terminates in the fissure upon which the Transcontinental Tunnel is driven, or, if it continues beyond that, it is found in a small fissure appearing in said tunnel on its southwest side, about ten or twelve feet, westerly from the point where the drift from the sixty-five foot shaft intersects said tunnel. If this fissure is a continuation of the Discovery vein of the St. Louis, it is entirely undeveloped, and a very slight

change in the strike of the vein, as shown between the Transcontinental Tunnel and the sixty-five foot shaft, would carry it across the westerly side line of the St. Louis, and make the side lines, so-called, the actual end lines of the claim.

The St. Louis claims that the vein shown in its southerly drift from the Transcontinental Tunnel is the same vein as its Discovery vein, and that there has been a faulting and throw of the vein, of ninety-five feet. This theory is negatived by the fact that no drag is found in the talc seam, or selvage in the Transcontinental fissure, and the further fact that in going about fifteen or twenty feet further into the tunnel, the contact between the granite and slates is found on the right hand, or southerly side, of the tunnel, and it is fifteen feet from the point opposite until the same contact is encountered on the left, or northerly side of the tunnel. Evidence of movement is found on the walls, and the throw of fifteen feet is exactly in the opposite direction from that claimed by the St. Louis Company. The throw as shown by the contact, corresponds in distance and direction to the throw which must have occured, if the little fissure found on the south westerly side of the Transcontinental Tunnel is a part of the St. Louis discovery vein as already mentioned.

There is absolutely no controversy as to the fact that the vein shown in the sixty-five foot shaft is the St. Louis Discovery vein; that if it extended so far, it would cross out of the St. Louis surface boundaries at about the point where it has drawn down its so-called 520 foot

plane, and as to the course or strike of the vein between its most easterly point of development, and the point where it intersects the fissure upon which the Transcontinental Tunnel is driven. At this point it either terminates or, if it continues further, it is found in the small fissure already referred to. In dip it is almost vertical, sometimes slightly dipping to the east and in other places slightly to the west, so that whether it extends beyond the Transcontinental Tunnel, or does not, it would be physically impossible for it to have extra-lateral rights in the Nine Hour, or in the Compromise Ground, in the territory where the St. Louis Company claims extra-lateral rights for the Drum Lummon vein found within its surface boundaries.

Another feature appearing on this record and which did not, at least, so clearly, appear on the former record, is the fact that in the Adverse Claim Suit there was an area of 1.98 acres involved, of which the Compromise Ground was a part, and that in the settlement resulting in the bond for a deed, the Nine Hour people only secured about a twelfth of the ground to which they claimed to be justly entitled. In the opinion rendered on our writ of error, 102 Fed. 430, your Honors seemed to be of the opinion that the Compromise Ground embraced the entire area involved in the Adverse Claim Suit, and great stress was laid upon that feature. It was not perceived how the owners of the Nine Hour, could have obtained any greater rights by the Compromise, than they would have had if the adverse action had gone to trial and resulted in a judgment in their favor.

On the subject of damage, and as tending to show strongly and clearly the oppressive and outrageous character of the verdict, and the judgment standing against us, the business books of the plaintiff in error were introduced in evidence, and an abstract of them from Nov. 1st, 1898, to May 1st, 1899, the period when the ores claimed by the St. Louis Company, were mined and milled, appears, in the record, as "Defendant's Exhibit J". As tending to show still further the excessive character of this verdict, this record shows the amount of ore worked, and of bullion received for each period of six months, from 1893 to 1898 inclusive.

There are other new features of minor importance, but it is not deemed essential to set them out in our statement of the case. Otherwise the facts are substantially the same as when the case was here before. These are found so fully stated in the two opinions rendered and in briefs of counsel on file, that it would probably serve no purpose to attempt to set them out at length again.

For a reversal of the judgment and for such further relief as this Court may find us entitled to, we will rely upon the following assignment of errors:

## ASSIGNMENT OF ERRORS.

### I.

The witness Wm. Mayger having testified that the original location of the St. Louis Lode was at the point marked on the map (Plaintiff's Exhibit 1.) as the 65 foot shaft and that a vein was connected with that original discovery.

Whereupon the witness was asked the following question:

Q. "Which direction does it run?"

To which said question the defendant objected on the ground that the same was irrelevant and immaterial, and the court erred in overruling said objection for that the direction or strike of the discovery vein was not in issue, there being no allegation in the complaint relating to the strike or dip of the discovery vein.

### II.

The court erred in permitting the witness William Mayger to testify as to the ground which had been stoped out by the defendant northerly of the 133 foot plane, and to point the same out to the jury on the map (Plaintiff's Exhibit 1). The witness having testified that the ground between the planes, from the surface down to the 190 foot level of the Montana Company had been stoped out by the defendant was asked this question, to-wit:

Q. "Point out to the jury northerly of the 133 foot plane where the stopes have been taken out?"

For the reason that the same was and is irrelevant and immaterial, because the stoping he was so required to testify about, was between plaintiff's 133 and 108 foot planes as shown on this map (Plaintiff's Exhibit 1) and between said points the plaintiff did not have the whole of the apex of the said Drum Lummon vein within the surface lines of its claim and it had no right to take the said vein on its strike beyond the west line of the Compromise Ground, or to take any portion of the surface of said Compromise Ground, and the court erred in admitting in evidence over defendant's objection testimony as follows:

(a) In permitting the witness, William Mayger, to testify, as follows: "The entire vein is stoped out between the 108 and 133 foot planes, from the surface to the 190 foot level of the Montana Company's works."

(b) In permiting the witness Parks to testify as follows: "I have block No. 1, the stope south of the north line of the Montana Company's apex shaft, to the 133 foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the Compromise Ground extended downward vertically. The block has an average width of 7 feet, is 21 feet long and 36.3 feet high."

Also the testimony of said witness, as shown by the record with reference to blocks 2, 3, 5, 6, and 7, all of which lie wholly within the Compromise Ground and between plaintiff's so called 108 and 133 foot planes.

III.

The court erred in admitting evidence over defendant's objection of the strike and dip of plaintiff's discovery vein as follows, to-wit:

(a) In permitting the witness, Wm. Mayger, to testify that the St. Louis Discovery Vein ran very nearly parallel with the side lines of the St. Louis, as staked; that it dipped to the east; that they had traced it to within 95 feet of the end line at the south end, and within 400 feet of the north end.

(b) In permitting the witness, Walter Proctor Jenny, to testify as follows: "I have examined the discovery vein of the St. Louis Lode Mining Claim. Its course is substantially northeast and west. Explorations under ground show that it lies within 750 feet of the north end line, and in the south end it is traced to within 95 feet of the end line. The dip of the vein is from vertical to a dip of 85 to 90 deg. easterly.

(c) In permitting the witness, John R. Parks, to testify as follows, to-wit: "The discovery vein of the St. Louis is a gold bearing fissure vein, running in the general direction of the side lines. The vein is developed both northerly and southerly from the Transcontinental Tunnel."

(d) In the admission of all other testimony, shown in the record relative to the discovery vein of plaintiff's St. Louis Mining Claim, all of such testimony having been admitted over defendant's objections.

IV.

The court erred in admitting all testimony as shown by the record relating to ores mined by the defendant in the Compromise Ground, for the reason that the plaintiff was estopped by the judgment in the Specific Performance Case from claiming any ore, or mineral found within the surface boundaries of said Compromise Ground, and particularly the court erred in permitting the witness, William Mayger, to testify, over defendant's objection that "The entire vein is stoped out between the 108 and 133 foot planes, from the surface to the 190 foot level of the Montana Company's works. I had Professor Parks and Mr. Keerl measure up the stopes taken out by the defendant, and compute the number of tons that had been so taken."

(b) In admitting the testimony of Joseph Wallish over defendant's objections as follows: "I have heard the testimony of Mr. Parks, and heard him speak of testing certain samples. I was present when those samples were taken. The first sample was taken in the Montana Company's Apex Shaft; it was taken from the north easterly portion of the shaft."

(c) In admitting the testimony of John R. Parks, over defendant's objection, and permitting him to testify as follows: "I have block No. 1, the stope south of the north line of the Montana Company's Apex Shaft, to the 133 foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the Compromise Ground extended downward vertically."

V.

The witness William Mayger having testified that the plaintiff had workmen on the south end of its St. Louis Claim, on Saturday, the 29th day of May, 1905, developing the foot-wall of the vein, was asked on cross-examination this question, to-wit:

"If that man were at work 78 feet below corner No. 3, and there had been no foot-wall there, will you tell me the width of that apex provided the hanging wall took the course you indicated by your ruler from the 108 foot plane crossing through the Nine Hour shaft?"

Which question was objected to by the plaintiff, and the court erred in sustaining such objection, for the reason that the same was proper cross-examination as tending to develop the knowledge of the witness and his interest in the litigation.

VI.

The court erred in admitting in evidence a certain map of the St. Louis Mining Claim, and in permitting blue print copies of the same to be given to each of the jurors. The only authentication of said map being that the witness William Mayger on his redirect, upon being shown the map by counsel, testified that generally speaking it represented as far as he knew anything about it, the general situation, but that he did not know who prepared the map or the map of which it was a copy. That it was a fair enough illustration except that according to his idea, there was not so much throw of the dis-

covery vein on the fault line, and that the two ends ought to be nearer together and that a line ought to be a little bit higher up, otherwise it was all right.

VII.

The court erred in permitting the witness, William Mayger, to answer the following question relating to said map, to-wit:

Q. "I will ask you if that bears a general resemblance of the general situation of the Drum Lummon Mining Claim to the rest of the property?"

For that the question was leading, immaterial and irrelevant.

VIII.

The court erred in admission of evidence offered by the plaintiff in the following instances, to-wit:

(1) The witness John R. Parks having testified that himself and Mr. Keerl made a careful survey of the ground and accurately measured all of the stopes and cavities from which ore had been removed, was permitted to testify over defendant's objection as to ore removed between the 108 and the 133 foot planes and ore lying wholly within the surface boundaries of the Compromise Ground.

(2) The said witness having testified that he had divided the stoped ground into eleven blocks lying north of the 133 foot plane down to the 190 foot level in the defendant's ground, was required to take the blocks and tell the tonnage and value he found in each block over

the objection of the defendant. For that it included blocks in the Compromise Ground, which by the judgment and decree in the Specific Performance Case, was found to be the property of the defendant, and because they were not within the recovery period under the pleadings in the action, in that a portion thereof at least was taken out since September 16th, 1893, and also because the recovery for ore extracted after September 16th, 1903, is limited by the supplemental pleading.

(3) The court erred in permitting the witness Parks to testify to what he denominated block One being the ground south of the north line of the Montana Company's apex shaft to the 133 foot plane from the surface to the instrument at K. and containing 410½ tons of the value of $59,522.50.

(4) The court erred in permitting the said witness Parks to testify with reference to the cubical contents and value of each of the blocks, numbered 2, 3, 4, 5, 6, 7, 8, 9 and 10, for the reason as already assigned.

IX.

The court erred in not permitting the witness for the defendant, John H. Farmer, to answer the following question, to-wit:

Q. "Drawing a line at right angles to that one (indicating the east line of the Compromise Ground) 50 feet from the center of the discovery shaft on the Nine Hour, where would it bring it on the map, that is from the center of the discovery shaft on the Nine Hour and

at right angles to the line between corners 2 and 3 on the St. Louis?''

Said witness having testified that he was a mining engineer and had made the map (defendant's exhibit E) about which he was testifying.

X.

The court erred in refusing to permit the witness John Langan, William Robinson, Warren DeCamp, F. P. Sterling, John W. Eddy and Joseph K. Toole to be called to the stand, and in requiring the defendant to submit to the court in an offer of proof what it expected to establish by the testimony of each of said witnesses severally.

XI.

The court erred in refusing to permit the defendant to call to the witness stand, John H. Farmer, and to prove by him that he had read the complaint in the Adverse Claim Suit, brought by the owners of the Nine Hour against the St. Louis Claim, which complaint is referred to in the complaint in the Specific Performance Case; that he knew the description therein contained and that it represented the area of 1.98 acres. That he had platted the area in conflict on the map, (Defendant's Exhibit E), and that it included the 30 foot strip or the Compromise Ground.

XII.

The court erred in sustaining the objection made by plaintiff and in refusing to permit the defendant to prove

by the witness William Robinson, present in court, that he was the person who located the Nine Hour Claim and the representative of his co-owner when the settlement of the Adverse Suit was made. That the whole area in conflict in that suit was 1.98 acres, the boundaries of which were accurately shown upon the map (defendant's Exhibit E); and that all of the strip described in the bond was the easterly 30 feet of said 1.98 acres. That the instructions he received with reference to the settlement of said Adverse Claim Suit from his co-owner DeCamp, was that he was to retain the right to the ore beneath the Compromise Ground without regard to where the apex of the lode was, in which said ore might be contained. That it was arranged with William Mayger representing Charles Mayger, that the Nine Hour claimants were to have the 30 foot strip and, "All of the mineral therein contained" without regard to where the apex of the lode might be in which such mineral was contained. That this was the distinct understanding of the parties before the bond (Defendant's Exhibit A) attached to its answer was drawn up. That said bond was drawn up by Messrs. Toole & Toole, who were the attorneys for William Mayger. That the witness, after said bond was drawn up, went to Joseph K. Toole with said bond and enquired of him whether the obligor in said bond could pay the penal sum named therein, and avoid making conveyance of the said premises, and whether by its terms the bond gave to witness and his co-owners all of the mineral contained in said Compromise Ground regardless of where the

lead in which it was found might have its apex. That he knew where the east side line of the St. Louis Lode Mining Claim was prior to the time that he staked his Nine Hour Claim, and that the westerly line of the Nine Hour Claim was not within 25 feet on the south end and 50 feet on the north end of said St. Louis east side line. That after his discovery, the south east corner stake of the St. Louis was moved up to a point near the east side line of his Nine Hour Claim, which point is correctly shown on defendant's map (Exhibit E). That when the St. Louis was surveyed for patent, such survey was started from its northeast corner stake and ran in the direction of the stake which had been moved to the point marked corner No. 2 on its survey, where a monument was put up, where no stake or monument had ever stood before, from which point the said side line had an angle to its corner No. 3. That the extension of said east side line of said St. Louis Claim over witness' Nine Hour Claim, was wrongful and resulted in securing as a part of said St. Louis Mining Claim all of the area of said Nine Hour Claim embraced within such line, save and except the 30 foot strip.

XIII.

The court erred in refusing to permit the defendant to call Warren DeCamp and to establish by him that he was a co-owner in the Nine Hour Claim at the time that the Adverse Claim Suit was pending; that he knew the settlement that was made and that he would not have consented thereto, but for the fact that the owners of the

Nine Hour were to have the 30 foot strip, together with all of its mineral contents regardless of where the apex of the lode in which such mineral so found, might be. That he knew of the wrongful extension of the east side line of the St. Louis over the Nine Hour, made at the time of the survey for patent of said claim. That he knew where the east line of the St. Louis was as originally staked, and the west line of the Nine Hour as that claim was staked, and that there was an interval of unclaimed territory between the two lines.

XIV.

The court also erred in sustaining plaintiff's objection to calling Frank P. Sterling, then in court, to the witness stand and in refusing to permit the said defendant to prove by said Sterling that at the time (Defendant's Exhibit A) attached to defendant's answer herein, was drawn, he was a lawyer, was interested in said Nine Hour Claim as a co-owner, that he understood the law of apex rights, that it was distinctly understood and agreed between the owners of the Nine Hour, and of the owner of the St. Louis, at the time said bond was made, that the owners of the Nine Hour should own all of the mineral contained in said 30 foot strip or Compromise Ground, and that the owner or owners of the St. Louis should not have the right to follow into such ground any lead, lode, ledge or vein having its apex within the surface boundaries of the St. Louis Claim. That the witness, William Robinson, after said bond had been drawn

up, took it to Governor Joseph K. Toole to learn whether it relieved the ground known as the Compromise Ground from the apex rights of the St. Louis Claim adjoining it. And that he, said Robinson, would not accept said bond until he had been so assured of said fact.

XV.

The court erred in sustaining the objection made by the plaintiff to defendant's offer to prove by the witness John W. Eddy, that he was a co-owner in the Nine Hour Claim at the time of the settlement of the Adverse Suit. That it was the distinct understanding between all of the parties to that settlement, that the Compromise Ground was to be a piece of ground whose westerly line should be parallel to the lines of the St. Louis between corners numbered 2 and 3 and 50 feet distant from the center of the Nine Hour discovery shaft. That no settlement or agreement would have been entered into by the obligees named in the said bond, but for the fact that the said obligees were to have all of the mineral contained in said ground without regard to where the apex of the vein might be in which such minerals were found.

XVI.

The court also erred in sustaining the objection made by the plaintiff to the calling of John Langan, then in court, to the witness stand, and in sustaining its objection made to the offer of defendant to prove by said witness that he knew where the east line of the St. Louis Claim was originally located and where the west line

of the Nine Hour was located, and that he knew that there was a vacant space of uncleared ground between the two lines. That he knew that the easterly line of the St. Louis was wrongfully extended over the Nine Hour.

XVII.

The court erred in refusing upon objection of plaintiff to permit the defendant to call Joseph K. Toole and in rejecting its offer to prove by said witness that the bond for a deed (Defendant's Exhibit A) attached to its answer, was in his hand writing; that the words, "Together with all the mineral therein contained," were inserted therein because that was the agreement of the parties at the time that said bond was drawn.

XVIII.

The court erred in refusing to receive the original bond (Defendant's Exhibit A) attached to its answer, in evidence, the defendant offering to show that said bond was in the hand writing of Governor Joseph K. Toole, who witnessed the instrument.

XIX.

The court erred in refusing to permit defendant to read in evidence the original complaint, and the replication in case No. 2798, Old Series of the records of the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis and Clarke, wherein William Robinson, et al, were plaintiffs, and Charles F. Mayger was defendant, being the Adverse Claim Suit referred to in the record in the Specific Performance Case, for the purpose of showing that the

area involved was the 1.98 acres testified to as shown upon Defendant's Exhibit E.

XX.

The court erred in granting the plaintiff permission to amend the *ad damnun clause* of its complaint so as to change the $50,000 therein mentioned to $400,000. Such amendment not being necessary in order to make the pleadings correspond with the proof, and the same depriving the defendant of substantial rights.

XXI.

The court erred in overruling and denying defendant's motion to direct a verdict in its favor.

XXII.

The court erred in its charge to the jury in telling them in the preliminary portion of its charge that, "defendant's answer then contains affirmative allegations which are not important in this trial and therefor no further reference is made thereto."

XXIII.

The court erred in its charge in giving to the jury its instruction Number 5, which said instruction is as follows, to-wit:

> "The plaintiff must show a right of recovery. This applies as well to the question of extra-lateral rights on the Drum Lummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a prima facie case by its

evidence, and the presumptions of law applicable to the situation, that it has extra-lateral rights to its discovery vein, between the 520 and the 133 foot planes, and therefore to that part of the Drum Lummon vein in dispute, then the defendant must overcome this prima facie case and these presumptions by *showing to the satisfaction of the jury* that plaintiff has no extra-lateral rights."

XXIV.

The court erred in charging the jury as in its instruction No. 8, which said instruction is as follows, to-wit:

"If you find that the course or strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location. And I further charge you that the burden is upon the defendant to overcome this presumption *to your satisfaction*. It is not necessary, in order to give plaintiff extra-lateral rights on that part of the Drum Lummon vein which apexes within the surface boundaries of the St. Louis Claim, between the 520 and the 133 foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis Claim between said planes generally lengthwise of the claim."

XXV.

The court erred in its charge to the jury in giving its instruction No. 17, which is as follows, to-wit:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock and ore within the planes belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass can not be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injury it has sustained."

XXVI.

The court erred in its charge to the jury in giving to the jury its instruction No. 18, which said instruction is as follows, to-wit:

"The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the moneys expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant, or any salaries paid to its officers, or any wages to any person except

those actually employed and engaged in the extraction, transportation and milling of the ores in question."

XXVII.

The court erred in its charge to the jury in giving its instruction No. 19, which is as follows, to-wit:

"When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extra-lateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it was a trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the wilfulness of the trespass, had it been comitted upon and within the surface boundaries of the St. Louis Claim and the ore extracted therefrom."

XXVIII.

The court erred in its charge to the jury in giving to said jury its 20th instruction, which is as follows, to-wit:

"If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and the 133 foot planes,

and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrong-doer and supply the deficiency of proof caused by the misconduct of defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff, as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence."

XXIX.

The court erred in its charge to the jury in giving to said jury its 21st instruction, which is as follows, to-wit:

"As to the evidence disclosed by the books of defendant and the abstract thereof, offered in evidence in behalf of defendant, I charge you that to entitle them to be considered as sufficient evidence to prove the value of the ore extracted from the Drum Lummon vein, you must be satisfied that the ores taken from other parts of defendant's mine, which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition."

XXX.

The court erred in giving to the jury its 23rd instruction, which is as follows, to-wit:

"The law is well settled that if one wilfully places the property of another in a situation where

it can not be recovered, or its true amount or value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value of which the property in question can be reasonably estimated."

XXXI.

The court erred in its charge to the jury by giving to the jury instruction No. 32, which is as follows, to-wit:

"In considering any ore extracted from Block 8, part of which was removed under the authority of this court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed, deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed you should make a deduction in accordance with the general rules laid down in the charge."

XXXII.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No.1.

"The defendant having heretofore and on or about the 1st day of June, A. D. 1905, recovered a judgment and decree against the above named plaintiff in the District Court of the First Judicial

District of the State of Montana, in and for the County of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein and in evidence before you. And it not appearing from the testimony herein, that said judgment, in so far as it awards all of the mineral contained in the Compromise Ground to the defendant herein, has been, or was at any time modified, reversed or so restricted in its meaning, as to apply only to such mineral as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said Compromise Ground, and, it appearing further, that in and by said judgment and decree, the plaintiff herein was forever barred from all interest or claim to said Compromise Ground, or to any part or portion thereof, or to the possession thereof, or of the mineral or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff as to any and all mineral contained in said Compromise Ground, whether the leads, lodes, or veins wherein such mineral is found, have, or have not their apices within the surface boundaries of the plaintiff's St. Louis Claim or otherwise, and as for all alleged trespasses in said Compromise Ground, you will not take the same into your consideration or return any verdict therefor.

The court instructs you that in order to entitle a miner to follow a vein or lode having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of such top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133 foot planes, it has only a part of the top or apex of the Drum Lummon Lode within its surface boundaries. The court therefore instructs you that as between these two planes, the plaintiff would not have the right to follow this vein

on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and the 133 foot planes."

XXXIII.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. 11, which said instruction is as follows, to-wit:

"It appearing that in and by the bond for a deed, a copy whereof is annexed to the defendant's answer herein, and by the judgment rendered on or about June 1st, 1895, in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, in an action wherein the predecessor in interest of the defendant herein was plaintiff and the plaintiff herein was defendant, the plaintiff herein was precluded from asserting any right, title, or interest in and to the Compromise Ground, or to any and all mineral therein contained, the said plaintiff had neither the actual nor constructive possession of the ground in which the trespasses complained of are alleged to have been committed and is, therefore, not entitled to recover in this action. You are therefore instructed to return a verdict for the defendant."

XXXIV.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XII, which said instruction is as follows, to-wit:

"It is alleged in the answer in this case that a judgment was duly rendered and given on or about the 1st day of June, A. D. 1905, in an action then

pending in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of the plaintiff by its replication filed in this action, that such judgment was rendered, but, it is alleged that it was confined to such mineral, and such mineral only, as was, or is, found in leads or lodes having their tops or apices wholly within the surface boundaries of the said Compromise Strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the Compromise Ground was distinctly in issue in that case, as appears by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of the plaintiff's rights to recover, for any and all ores which you may find that the defendant has mined within the surface boundaries of the Compromise Ground extended downward vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff."

XXXV.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XVI, which said instruction is as follows, to-wit:

"The section of the Mineral Land Act which grants to the owner of a mining claim the right of extra-lateral pursuit of a vein having its top or apex

within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course, beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis Claim introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extra-lateral right on the Drum Lummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of the defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extra-lateral right, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drum Lummon vein, and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

XXXVI.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XIX, which said instruction is as follows, to-wit:

"The burden of proof in this case is on the plaintiff, and unless you find from a preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, then your verdict should be for the defendant."

XXXVII.

The court erred in refusing to instruct the jury as

requested by the defendant in its instruction No. XXI., which said instruction is as follows, to-wit:

"As I have already explained to you, plaintiff's extra-lateral rights on the Drum Lummon vein, where the same is found within surface boundaries of its St. Louis Claim, is limited and controlled by the extra-lateral rights which you may find from the testimony it has, or would be entitled to on its discovery vein, should that vein in its course downward on its dip extend to and under the surface boundaries of the Nine Hour Claim. The law does not contemplate that the owner of a mining claim shall have a greater length of vein beneath the surface than he has length of apex of the vein on the surface. For illustration, suppose that the plaintiff in this case, had only, one hundred feet of the apex of its Louis Claim within the surface boundaries of its claim, and that it was so situated with reference to the Nine Hour Claim, that on its dip downward and under the surface of that claim it would have extra-lateral rights; then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour Claim.

Applying these principles to the case at bar, the court instructs you that if you should find from a preponderance of the testimony that the vein in the sixty-five foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis Claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental Tunnel or fissure, then plaintiff's extra-lateral rights on the Drum Lummon vein are controlled by the length of the discovery vein of the St. Louis Claim and are practically coterminous therewith. To illustrate what I mean, suppose you should find that at the northerly end of the discovery vein of the St. Louis, it terminates practically at the end of the North

easterly drift driven by plaintiff from the bottom of its sixty-five foot shaft, then you would be authorized to draw an imaginary line from said point to the Drum Lummon vein, at right angles to the general course or strike of said Drum Lummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extra-lateral rights on the Drum Lummon vein. Then should you further find, from a preponderance of the testimony, that plaintiff's discovery vein on its westerly course practically terminates at the Transcontinental Tunnel, or fissure, then a line drawn at right angles to the general course of the Drum Lummon vein to such westerly point of termination of the St. Louis discovery vein, will mark the termination of plaintiff's extra-lateral rights in said Drum Lummon vein, no matter how much further to the southward the whole, or a part, of the apex of the Drum Lummon vein may be found within the St. Louis Claim."

XXXVIII.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXIII, which said instruction is as follows, to-wit:

"If you should find from the testimony that the vein in the sixty-five foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental Tunnel, and that the vein found in the sixty-five foot shaft passes through the fissure shown in the Transcontinental Tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence, that such vein continues on its course through its St. Louis Claim, and passes

out of the south end line of its claim, or practically does so. If you should find from the evidence that the fissure shown in the south side of the Transcontinental Tunnel at a point a little westerly of the point where the vein from the sixty-five foot shaft intersects said tunnel, is the same fissure as that in which the vein in the sixty-five foot tunnel is found, but that it only extends into the wall of the tunnel for a few feet, and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental Tunnel as practically the southerly end of plaintiff's said discovery vein and your verdict should be for the defendant."

XXXIX.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVI., which said instruction is as follows, to-wit:

"The court instructs you that your first duty is to examine and ascertain what, if any, extra-lateral rights attach to the discovery vein of plaintiff's St. Louis Claim. In the first place, you must ascertain which of the surface lines are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them out on the ground, or named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practicaly parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from the evidence that the discovery vein of the St. Louis Claim was in what has been denominated the 65 foot shaft, and that the vein therein discovered, on its course or strike through the claim, would pass out of the surface boundaries of the St.

Louis, between corners numbered one and two thereof, and that following said course in a southwesterly direction, it would pass out of the westerly boundary of said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which it first discovered, and upon which it made its location, was substantially parallel to the easterly boundary line of its claim, before you would be justified in awarding its extra-lateral rights on the Drum Lummon vein, or on so much of it as has its apex inside the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extra-lateral rights within or under the Nine Hour Claim, and extra-lateral rights could not be claimed for the Drum Lummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all of the Drum Lummon lode found within their surface boundaries, but they could not pursue it on its dip an inch beyond the easterly line of the St. Louis Claim, extended downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extra-lateral rights under the Nine Hour Claim, it is plaintiff's misfortune, and one which neither this court nor this jury can correct. Mr Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein and not across it."

XL.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVIII, which said instruction is as follows, to-wit:

> "It conclusively appears by the testimony in this case, and it is an undisputed fact that the Compromise Ground, or the thirty-foot strip, as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim. The Court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis Claim was first located and first patented. Having been patented as a part of the St. Louis, the Compromise Ground is to be regarded as standing exactly on the same plane, so far as priority is concerned with every other part of the St. Louis Claim."

XLI.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXXII., which said instruction is as follows, to-wit:

> "Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded to the defendant company or its predecessor, I instruct you that the extra-lateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis Claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis Claim was prior to the Nine Hour,

does not involve any admission on the part of the defendant that the portion of the St. Louis Claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis Company to follow the vein to depth in this action must be limited by what is called the 108 foot plane, or the departure point of the hanging wall and that there can be no revovery in this case for any ores extracted south of the 108 foot plane."

XLII.

The court erred in giving to the jury its instruction No. 7, which said instruction is as follows, to-wit:

"It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis quartz lode mining claim, between the 520 foot plane and the 133 foot plane, which have been described to you in the evidence; but the defendant insists that the St. Louis quartz lode mining claim is not entitled to extra-lateral rights on the Drum Lummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary, or incidental, vein of the St. Louis Claim. Under the Statutes of the United States, the locators of a mining claim have the exclusive right of possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface

lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. These extra-lateral rights, under the decisions of the Supreme Court of the United States, as to the secondary or incidental veins, are the same as those given by the statute upon original or discovery veins; and if, therefore, plaintiff had extra-lateral rights upon its discovery vein, including that portion of the St. Louis claim within the above planes in which is found the apex of the Drum Lummon vein, so called, then plaintiff has extra-lateral rights upon that part of the Drum Lummon vein. Plaintiff claims that the original or discovery vein of the St. Louis claim runs through the earth beneath the surface of said claim in the general course of the side lines of said claims. If you find from the evidence that the original or discovery vein of the St. Louis claim, on its course or strike, passes through the earth within the limits of its surface boundaries, between the 520 and the 133 foot planes, on a general course lengthwise of the claim, then plaintiff has extra-lateral rights to such parts of the original discovery vein between said planes, and would have corresponding extra-lateral rights upon any secondary or incidental veins having their apexes in the St. Louis between said planes."

XLIII.

The court erred in giving to the jury its instruction No. 9, which said instruction is as follows, to-wit:

"And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) run lengthwise of the St. Louis claim between its side lines and extend

from the 520 to the 133 foot planes, and dip easterly, then plaintiff would be entitled to extra-lateral rights for that vein (or those veins) and to the like extra-lateral rights for all other veins having their apices within the same limits, and running in the same general direction."

XLIV.

The court erred in giving to the jury its instruction No. 11, which said instruction is as follows, to-wit:

"There are two rules established and adopted by the Federal and other courts of the United States with reference to the measure of damages in cases of this kind, and which rule applies, depends upon whether or not the trespass under which the ore was extracted, was wilfully committed or done in good faith. If you find from the evidence that the defendant entered on that part of the said Drum Lummon vein which apexes in the St. Louis quartz lode mining claim, between the planes aforesaid, and extracted the said ore therefrom wilfully, recklessly and with knowledge that said vein did apex within the said St. Louis claim then your verdict must be for the value of the ore which you must determine from the evidence introduced. If, however, the defendant had sufficient reason to believe, and did honestly believe at the time it entered upon said vein and extracted and removed said ore, that the same belonged to said defendant and not to the plaintiff, and that it had lawful right and authority to extract and remove the same, then the trespass was not wilful and the plaintiff is entitled to the value of the ore, subject to the deduction for the reasonable cost of mining of said ore, hoisting the same to the surface, transporting the same to reduction works and the reason-

able cost of such reduction. The actual cost to the defendant of all. or any, of those items is not conclusive upon the value thereof. Defendant is not entitled to reduce the value of the ore by any sum greater then the reasonable value of the items above mentioned, and you must determine such reasonable value from the evidence given in the case. In determining the character of the trespass, you have the right to disregard all testimony given by the defendant tending to establish good faith, if, in your judgment, the action of the defendant discloses to your satisfaction that the claim of defendant, that it acted undr an honest belief that it owned the ore in question and had a right to remove it, was merely for the purpose of reducing the damages which it would have to pay for such ore upon a suit to recover the value thereof by this plaintiff, and find that the action of defendant in extracting and removing the ore in question was wilful."

XLV.

The court erred in giving to the jury its instruction No. 14, which said instruction is as follows, to-wit:

"The burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value; and in arriving at a verdict, you are to take into consideration all of the circumstances and facts presented by the evidence in the case. However, if you are satisfied that the plaintiff has shown its ownership, and given evidence to show the amount of ore extracted and the value thereof, the burden is upon the defendant to show, if it can, that the trespass complained of was not wilful. A presumption arises from the extraction of the ore from a vein which has its apex within the plaintiff's mining claim, by the

defendant, that the trespass was wilful and that the defendant is liable for the value of the ore taken from the mine. This presumption is, however, disputable, and the burden is upon the defendant to show in mitigation of damages that it was not a wilful trespasser and thus be relieved from payment of the value of the ore as stated in other instructions herewith given to you."

XLVI.

The court erred in giving to the jury its instruction No. 15, which said instruction is as follows, to-wit:

"If you find that the defendant has prevented the plaintiff from ascertaining the exact amount of the ore or its value, by extracting and removing the same, or has placed it beyond the power of the plaintiff to make such proof certain and specific, the law will aid the remedy against the wrong-doer and supply the deficiency of proof caused by his conduct by making every reasonable intendment against him in favor of the party injured."

XLVII.

The court erred in giving to the jury its instruction No. 16, which said instruction is as follows, to-wit:

"In estimating the damages to the plaintiff, if you find from the evidence that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by extracting the greater part of the ore, or all of the valuable ore in any particular places of the mine, or by mixing the ore taken from plaintiff's ground with ore of less value, belonging to defendant, or with any other material taken from any other places in the mine, then the jury in de-

termining the value of the ore taken, are at liberty to consider the highest value of ore found in the vicinity of the ore extracted."

XLVIII.

The Court erred in requiring the defendant to submit its exceptions to the charge of the Court in writing, before the going out of the jury, and in the presence of the jury, the same being contrary to Rule No. 58 which is as follows, to-wit:

"Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the Court after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same."

XLIX.

The court erred in inserting into the defendant's bill of exceptions on the settlement thereof, the exceptions in writing hastily made and filed before the going out of the jury, the same not having been proposed as an amendment by the plaintiff to defendant's proposed bill of exceptions.

L.

The Court erred in refusing to allow the exceptions to the charge of the Court given to the jury, as in defendant's proposed bill of exceptions and in cofining the exceptions of the defendant to the exact language used by it in the written exceptions filed before the retirement of the jury.

## ARGUMENT.

### THE LAW OF THE CASE.

The first question that confronts us is whether the two opinions of this Court, formerly rendered, and already referred to, are the "law of the case" and are to control absolutely the determination of the rights of the parties here, as they did in the court below. Nothing seems to us to be clearer than that it was the intention of this court to relieve the case of this doctrine, by its judgment of Oct. 8th, 1902 and by the remittitur issued in pursuance of that judgment. Both of the judgments formerly rendered were VACATED AND SET-ASIDE. "and that in lieu thereof, it is ordered and adjudged that the judgment of the said Circuit Court in this cause, be and the same is hereby reversed with costs, and the cause remanded to the said Circuit Court for a new trial." That this court intended by this language, to set the case at large, and to relieve it absolutely from the doctrine of the "law of the case," would seem to us too clear to admit of any argument. This is still further emphasized in

the language of the remittitur which issued out of this Court. Its command to the Circuit Court is, to try the case "according to right and justice, and the laws of the United States." In not being guided by this plain injunction of the writ, and in referring every legal question, or questions of fact, to what was decided or found by this Court, as shown by the two reported opinions, we think the court below committed manifest error. Nor, in our opinion, did the District Judge do his duty toward this Court, by thus abrogating his functions as a court of justice, and referring all such questions for determination to the printed opinions; the judgments supporting which, had been set-aside. It is well known that the present District Judge has had a long experience in dealing with questions of mining law, both on the District and Supreme benches of the State of Montana, and it would have only been respectful for him to have given this court the benefit of his wide experience in this branch of the law. His independent, unbiased judgment upon the novel and difficult propositions involved in this case, could not have been otherwise than helpful to this Court, and that without regard to whether this court agreed or disagreed with him, as to their proper solution.

The judgment rendered in the case reported in the 102 Fed. affirming the judgment of the Circuit Court, and the one in the 104 Fed. reversing that judgment, have both been vacated and set-aside, expressly by the judgment of October 8th, 1902, and therefore their effect as an estoppel has been destroyed. The opinions ren-

dered are the reasons given for the judgments then ordered, and are therefore not conclusive upon this Court as the "law of the case" and were not conclusive upon the Circuit Court.

2 *Black on Judgments,* Sec. 511.

1 *Wharton on Evidence,* Sec. 781.

*French vs. Edwards,* 4 Savg. 125.

"On the reversal of a judgment at law, therefore, the theory of the law is that the parties are placed *in statu quo,* and are to be considered as if the judgment had never been rendered."

*Tarleton vs. Goldthwaite's Heirs,* 58 Am. Dec. 296-298.

*MacTielton vs. Love,* 54 Am. Dec. 449.

*Stearns vs. Aguirre,* 7 Cal. 443.

*Phelan vs. San Francisco,* 9 Cal. 15.

*Argenti vs. San Francisco,* 30 Cal. 463.

*Heidt vs. Minor,* 113 Cal. 385.

"It is the law of the case in the most exact and resrticted sense in which it can be claimed that the doctrine of *res judicata* should have application, for it is not the reasoning of the court, nor any mere legal principle announced, but the judgment itself which is relied on as conclusive of the questions in controversy."

*Lucas vs. City of San Francisco,* 28 Cal. 595.

We have consulted many cases in which the doctrine of the "law of the case" has been declared and enforced, but we have not been able to find a single one in which

the doctrine has been applied, where the judgment which gave the opinion force and vitality, had been revoked and set-aside.

The judgment by virtue of which this case was remanded, was the judgment of October 8th, 1902, and this was a simple judgment of reversal of the judgment of the Circuit Court, and a remand of the case for a new trial. Under these circumstances it is well settled that the doctrine of the "law of the case" does not apply.

> "When the decree was reversed and the case remanded generally, without any specific directions to the lower court, that court was not required to proceed according to the opinion of the Appellate Court, but it had authority to permit a change in the pleadings and to hear the cause *de novo.*"

*Lang vs. Metzer,* 69 NE. 493-497. Citing.
*Chickering vs. Failes,* 29 Ill. 294.
*Parker vs. Shannon,* 121 Ill. 452.
*Perry vs. Burton,* 18 NE. 653.
*Cable vs. Ellis,* 11 NE. 188.
*West vs. Douglass,* 34 NE. 141.
*Russell vs. Rush,* 48 NE. 990.

> "Where two conflicting opinions are delivered in the same case at different times and it is brought up a third time on error or appeal, neither one of the previous decisions is conclusive, but the case must be considered as if presented for the first time."

*Moore vs. Barclay,* 23 Ala. 739.

> "On a former trial of this case on appeal, reported in 5 Col. 341, the opinion reversing the case,

holds the law different from what we have laid down and we cannot and will not assent to the view therein expressed. The doctrine of a former adjudication can have no application to this case, as it was a simple reversal of the judgment of the court below, for reasons therein stated; but no judgment was given for the one party or the other except that of reversal, and what the law fixed as a consequence, the costs of court. The judgment of reversal is conclusive that the case was reversed but of nothing more."

*Bynum vs. Apperson,* 9 Heisk. (Tenn.) 623-644.

"But to give the binding decision these conclusive qualities, it ought to be explicity declared, and perfectly understood, and, to become the "law of the case," it ought definitively to settle the rights of the litigant parties."

*Hammond Lessees vs. Inloes,* 4 Md. 138-161

"But if this is the same case as that formerly before the court, it is a misnomer to call the opinion and a simple judgment of remand for a new trial *res adjudicata.* The opinion delivered may properly control the lower court and would undoubtedly, on the same facts, be entitled to great weight on a second appeal to this court. But the opinion, or reasoning for the judgment is no part of it, and the judgment itself is not final between the parties, and therefore is not conclusive."

*White vs. Downs,* 40 Tex. 227.

"Where the court of Appeals reverses a decree and remands the cause without directions, such order is not *res adjudicata* on retrial of the same cause in the County Court."

*Friedman vs. Lesher,* 64 NE. 736. Citing.
*Livingston vs. Strong,* 11 Ill. 152.
*Henning vs. Aldridge,* 156 Ill. 305-33 NE. 754.
*Board vs. Nelson,* 44 NE. 743.

"While the rule that an adjudication by an appellate tribunal becomes the law of the particular case on all subsequent trials, is a wholesome rule, and one that should be enforced, yet the rule should be confined to questions that were actually considered and decided, and it should not be extended so as to embrace dicta or intimations contained in an opinion which may be thought to fore-shadow the views of the Appellate Court on other questions."

*Patillo vs. Allen-West Com. Co.,* 108 Fed. 723-729.

The doctrine of the "law of the case" has been carried so far in some instances, notably in California, as that the courts have refused on a second appeal to review their first decision even though it might have been erroneous and contrary to the law as established by subsequent decisions. This ridiculous position, however, is rapidly being overturned, and courts are holding where a case has been in the Supreme Court and sent back for a new trial, though the judgment did not remain binding between the parties whereby subsequent decisions of the same court though not mentioning the particular case in which the original judgment was entered, or professing to overrule it, have subsequently decided to the contrary, that the court is not concluded by its former judgment, but it may, and will reexamine its

former decision and establish the law in conformity with right and justice and the weight of authority. For a very able and exhaustive opinion upon this feature see

*City of Hastings vs. Forworthy,* 45 Neb. 67.

## ALLEGATA ET PROBATA.

Our first assignment of error, raises the question as to the admissibility of proof of material facts not pleaded, and this error, if it be one, is preserved throughout the case by our assignment numbered 111. This was one of the matters which the court below decided against us because, and solely because it had been so decided by this Honorable Court in the case reported in the 102 Fed. We respectfully request the Court to reconsider its former opinion in this respect, if it shall determine that it is not bound by its former opinion. If, in other words it shall agree with us that the opinion heretofore rendered is not the "law of the case" and the question is still at large.

Since the decision of the case of *Walrath vs. Champion Mining Co.,* 72 Fed. 978, by the court, and its affirmance by the Supreme Court 171 U. S. 293, the most important feature of a suit to establish extra-lateral rights on a subsidiary vein, found within the surface boundaries of a mining claim, is the course or strike and dip of the original, or discovery vein. Its strike determines which are the side and which are the end lines of the claim. The right to extra-lateral rights on the subsidiary vein is wholly dependent upon the fact that on the discovery vein the claimant has extra-lateral rights to the same

extent and in the same direction in which he is asserting them for his subsidiary vein. It is respectfully submitted, that since this decision, which is now settled law, it would be impossible to try a case of this character without proof of the strike of the discovery vein. There is no presumption of law, arising from the patent, or otherwise, that the Discovery vein runs in any particular direction or has any particular dip on its descent into the earth. There is no presumption of law that the lines which the miner has denominated his side lines, or his end lines, are in truth and in fact such. That fact is to be determined by the fact of what lines the apex of his Discovery vein would actually cross, if it reached them. It is further respectfully submitted, as a necessary corollary, arising under the decision referred to, that if the discovery vein running toward an end line of his claim, terminates, or dies out before reaching the end line, and that fact appeared from the testimony, his extra-lateral right would terminate at the point where his Discovery vein so terminated.

*Carson City G. & S. M. Co. vs. North Star M. Co.,* 73 Fed. Rep. 597.

That the law does not contemplate that a miner shall have greater length of vein underground, than he has length of apex on the surface. That this being true as to the Discovery vein, it is equally true as to any subsidiary vein. His rights upon such vein must be absolutely controlled by his rights on the Discovery vein. It would

seem, therefore, that good pleading and correct practice would require the plaintiff in his complaint distinctly to aver the course or strike and dip of his Discovery vein, the essential fact, upon which his rights in his subsidiary vein depends.

In the case at bar, it is true as already found by this court, "that the complaint does not mention the direction of the Discovery vein or its dip" and it might have added that it did not mention the Discovery vein at all. And yet on the trial of this case, without any such allegation, or any allegation of any kind or character which would seem to make such proof revelant, the plaintiff spent days in the trial of this case in trying to prove that its Discovery vein ran substantially parallel to the side lines of its claim, passed through both end lines, and dipped to the east. The defendant on the other hand, without any denial in its answer, which would make such proof relevant, spent other days in proving that plaintiff' s discovery vein crossed the so-called east side line of the claim at a point near plaintiff's 520 foot plane, if it reached that point; that at the other end it terminated, or virtually terminated, at the cross-fissure upon which the Transcontinental Tunnel is driven; that the weak poverty stricken vein which plaintiff calls its Discovery, was not, and could not be, the same vein as the little vein shown in its south drift from the Transcontinental Tunnel.

In no other case that we have been able to find has there been such a radical departure from what we under-

stand to be the correct rule of practice. The inflexible rule of pleading and proof, as we understand it, is tersely stated by Mr. Chief Justice Field in *Green vs. Palmer,* 15 Cal. 411-415, as follows:

> "Second Rule—Those facts, and those only, must be stated which constitutes the cause of action, the defense or the reply."
>
> Therefore, FIRST, each party must allege every fact which he is required to prove, and will be *precluded from proving any fact not alleged."*

We might cite very many authorities in support of this proposition. There can be no doubt that this is a correct statement of the general rule, and no reason is perceived why this particular case should constitute an exception to it.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

We cannot abandon this contention. We must respectfully request this court, to reconsider its former ruling as to the sufficiency of this complaint. In doing so we are not unmindful of the fact, that counsel on the other side are able, ingenious and alert. That the complaint as amended prays damages in the sum of $600,000. and that the verdict of the jury was for $195,000., fabulous sums, when compared with the extent and character of the alleged trespass. Nevertheless, it is our earnest conviction that this complaint does not state facts

sufficient to entitle the plaintiff to recover a single dollar against us. In saying so, we assume that this Court must hold that it was essential that the plaintiff should have alleged the course or strike of its Discovery vein, and that, having failed to do so, its proof, in this particular, was irrelevant. In the absence of any allegation with reference to the Discovery vein, we have but one vein, the Drum Lummon, in the case, and that enters the St. Louis surface through its easterly boundary line, and departs through the same line. The simple question presented, then is, can a vein which enters and departs through the same line have extra-lateral rights? We observe that Mr. Lindley in his valuable work on Mines, (2 Lindley 2 Ed. Sec. 584.) recedes in a measure, from the view taken in the first edition, that under no circumstance could there be any extra-lateral rights attaching to such a location. The proposition is not definitively settled, but we are of opinion that the case of *Catron vs. Old,* 23 Col. 435 is rightly decided and will ultimately be held to be the law.

Probably the best settled proposition that has yet arisen under the mineral Land Act, is, that what are the end lines of a mining claim is to be determined by the course of the lode through a claim. That is an end line which the lode on its strike crosses.

*Flagstaff Mining Co. vs. Tarbet,* 98 U. S.,463-468.

*Iron Silver Mining Co. vs. Elgin M. Co.* 118 U. S. 196.

*Argentine M. Co. vs. Terrible M. Co.* 122 U. S. 478.

*King vs. Amy & Silversmith M. Co.* 152 U. S. 222.

*Del Monte Co. vs. Last Chance M. Co.* 171 U. S. 57.

*Walrath vs. Champion M. Co.* ibid 293-307

*Tyler vs. Sweeney* 79 Fed. 280.

*New Dunderberg M. Co. vs. Old* 74 Fed. 606.

To hold that a vein which enters and departs through the same line, could have extra-lateral rights, would be doing violence to this doctrine, and especially is this true when such a vein is the only one within the surface boundaries of the claim.

The principle for which we contend is very clearly stated by a judge who has had a very wide experience in the determination of questions arising under the Mineral Land Act as follows:

> "The defendant's contention seems to be that because they claim they have subsequently discovered the apex of a lode running northerly and southerly, at the easterly line of their surface location, they have a right to follow the lode on its dip underneath the Cosmopolitan claim, without regard to the direction or course of the lode located by Foote. But that right, in law, depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location and find out what the defendant Foote located; because, if he located on a lode that he thought had a northerly and

> southerly course, and made his location accordingly, and the subsequent developments proved that the locater was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his right by the facts as they are shown to exist, instead of what he thought existed at the time the location was made."
>
> *Cosmopolitan M. Co. vs. Foote,* 101 Fed. Rep. 518.

In this case, the Cosmopolitan case, the court found from the testimony that the discovered lode ran more nearly in an east and west direction through this claim, than it did in a north and south direction, and for this reason refused to give the defendant extra-lateral rights under the Cosmopolitan surface.

The question as to whether a vein which enters and departs through the same boundary of a mining claim, can have extra-lateral rights, is one of much importance to the miner. It is not unusual to meet exactly the conditions which are presented by the complaint in this action. It is one almost undecided, since *Catron vs. Old, Supra,* is the only authority to be found on it. While we think the case is right on principle, we recognize the importance of setting it at rest.

The most remarkable feature of this complaint, is found in the fact that after describing with painful particularity, the St. Louis Claim, by metes and bounds, it excepts from the area thus described, the *Compromise Ground,* "together with all the mineral therein contained," and as to this, it avers that we are the owners of

it. Here is a disclaimer of any right in the Compromise Ground, or to its mineral contents on the part of the plaintiff, a clear and unequivocal averment that the St. Louis Company, does not own it, and yet here is a judgment of $195,000, for what they have alleged belongs to us. This is alleged not simply as a recital, but as a matter of pleading; the acknowledgement of a fact in a sworn pleading. This we say shows conclusively, as a matter of confession on the part of plaintiff, that it has no cause of action.

True, in the fourth paragraph, it is alleged that the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis mining claim, is to the east and dips under and beneath the said Nine Hour mining claim including said thirty foot strip, or the Compromise Ground.

It expressly disclaims ownership and possession of the *locus in quo* upon which the defendant's entry was made, "and of all the mineral therein contained.". Against this express disclaimer there is an implication in the complaint itself, more or less strong, of ownership of a limited interest of "ores" in veins, lodes, or ledges within and beneath the previously excepted ground. But if the second allegation were in express and unmistakable terms, that the plaintiff was the owner of that which it had previously disclaimed, the only possible result would be an incurable repugnancy.

"So also, superfluous matter, when it contradicts or is inconsistent with facts before alleged on the same side, vitiates the pleading. This fault falls properly under the

denomination of repugnancy; which as the term imports, is some contrariety or inconsistency between different allegations of the same party.

Repugnancy is a fault in all pleading; and this is the obvious principle, that inconsistent allegations in the pleading, of either party, destroy or neutralize each other. The rule, however, is to be understood with this difference; If the pleading is repugnant on a material point, it is ill in substance or on general demurrer; but repugnancy in an immaterial point is a fault in form only, and therefore no advantage can be taken of it, except by special demurrer. Thus, if in trover, the declaration by mistake alleges the conversion to have taken place on a day prior to that on which the loss of the goods is laid; or if in ejectment, the ouster is laid prior to the alleged date of the lease; the repugnancy in either case, would at common law, (before the Statute of jeofails) have been fatal on general demurrer."

*Gould's Pleading* (3 American Edit.) Chapter III. Secs. 172-3.

"Again, if a pleading be inconsistent with itself, or repugnant this is ground for demurrer. But there is the exception: that if the second allegation which creates the repugnancy is entirely superfluous and redundant, so that it may be rejected without materially altering the general use and effect, it shall in that case be rejected, and shall not vitiate the pleading; for the maxim is *utile per inutile non vitiatur.*"

*Stephen on Pleading,* (1 Amer. Edit.) 378.

The case at bar does not fall within the exception stated by Stephen. The "second allegation which creates the repugnancy" is not "merely superfluous and redundant, so that it may be rejected, without materially altering the general sense and effect." It is the most material fact of the plaintiff's seizin and possession. It directly contradicts the former allegation. If it be rejected, it leaves the plaintiff without a cause of action as to mineral tained, it creates an incurable inconsistency with the previous allegation. To the same effect is Chitty. "But a material allegation, sensible and consistent in the place where it occurs, and not repugnant to any antecedent matter, cannot be rejected merely on account of there occurring afterwards in the same pleading, another allegation inconsistent with the former, and which cannot itself be rejected."

*1 Chitty on Pleadings,* (Sixteenth Amer. Ed.) 255.

*The King vs. Stevens,* 5 East, 254.

*Buckley vs. Kenyon,* 10 East, 142.

What more need be said? The complaint is inartistically drawn, does not state any cause of action, its allegations are repugnant to each other, it is bad in substance and insufficient in law to sustain the judgment. We ought not be required to go any further afield, to insure the reversal of this outrageous and iniquitous judgment.

## WHERE MUST WE DRAW THE LINE?

Our second assignment of error presents what is now an absolutely novel question. The only decision of the question was the opinion of this court as reported in the 104 Fed. and since the judgment in that case has been vacated, it is no longer an authority. It has been accepted without dissent, by both Mr. Lindley and Mr. Snyder, in their works on Mines, and has been cited in a number of cases since decided. Nevertheless we respectfully insist that in this respect this court was clearly wrong in its conclusion, and we ask for this important question a most careful reconsideration.

The error complained of has been preserved in our assignment, numbered VIII and XXXV.

It will be seen by reference to the opinion rendered, that it is based entirely upon the proposition that the St. Louis claim having the eldest location and patent, was entitled to the whole of the vein so long as it had any portion of the apex within its surface boundaries, and hence that the line should be drawn at the point where the foot-wall crosses the westerly side line of the Compromise Ground. In so holding, this court entirely overlooked the fact that the Compromise Strip, was patented as a part of the St. Louis Claim, and hence, so far as priority was concerned, it would stand exactly on the same plane as any other portion of that claim. If we go to the notice of location of the St. Louis claim, (Record p. 76) to which the patent relates, we find it was a parallelogram and not the hexagonal figure represented in the patent.

Turning then to the judgment-roll in the Specific Performance Case (Record p. 83) we see that when the St. Louis Claim was surveyed for patent, the easterly side line was wrongfully extended over the Nine Hour claim. The extent of this overlap and wrongful inclusion is conclusively shown by the Nine Hour Patent (Record p. 154) and by defendant's surface map "Exhibit E". This overlap extended westerly from the west line of the Compromise Ground, to the west line of the Nine Hour as originally located, and as to all this territory, the Nine Hour and not the St. Louis was prior in point of time.

We respectfully renew our contention that the words, "*Top or apex*" as found in sec. 2322 of the Revised Statutes, should not be construed as if it read, "top or apex, or any part or portion thereof."

We also respectfully suggest that there is nothing to be found in the case of *Argentine M. Co. vs. Terrible M. Co.,* 122 U. S. 478-484, which warrants this construction. In *2 Lindley on Mines,* sec. 287, will be found a diagram of the several claims involved in this case, and reading the opinion of the Supreme Court in connection with this figure, shows conclusively what was the scope of this decision. This is one of the side-end-line cases, and that is the controlling thought of the entire opinion. True Mr. Justice Field does remark in the outset of the opinion, that "Assuming that on the same vein there were surface outcroppings within the boundaries of both claims, the vein first located necessarily carried the right to work the vein." This might be fittingly applied to the

case of a broad apex bisected by a line common to two claims, but could have no application to the point where the boundary plane should be drawn, in the case of a lode crossing a side line of a claim at an acute angle.

In the case at bar, it is manifest that as soon as the hanging wall crosses the westerly line of the Compromise Ground, the plaintiff has not the whole of the top or apex of the Drum Lummon vein, on its side of the line. Proceeding southerly along this line, it has less and less of the apex, until it reaches its 133 foot plane where the foot-wall croses, at which point no part of it is within its boundaries. In order to give it extra-lateral rights between its 108 and 133 foot planes, the court must perforce make the language of sec. 2322 read, "The top or apex or any part or portion thereof."

> "Beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity, and rule that by reason of such equity, a party may follow a vein into the territory of his neighbor, and appropriate it to his own use. If cases arise for which Congress has made no provision, THE COURTS CANNOT SUPPLY THE DEFECT. Congress having prescribed the conditions upon which extra-lateral rights may be acquired, a party must bring himself within these conditions or else be content with simply the mineral beneath the surface of his territory."
>
> *Del. Monte M. Co. vs. Last Chance M. Co.,* 171 U. S. 55-66.

We turn aside for a moment to call attention to the

fact that this language is specially applicable to this case. The St. Louis was located nearly two years before the Nine Hour. The locator could then have laid the lines of his claim over the territory afterward taken as the Nine Hour, so as to include the great Drum Lummon vein. He did not do it. He did not get a foot of it within his lines. When he surveyed for patent, he fraudulently included about 600 lineal feet of that vein within his surveyed lines. By another fraud, he succeeded in locating the westerly side line of the Compromise Ground forty instead of fifty feet from the center of the Nine Hour Discovery shaft as called for in the bond. Out of this stolen territory he has got $111,000. He ought to be "content with simply the mineral beneath the surface of his territory."

> "The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the States and Territories of the United States, and in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be who owns the surface."
>
> *Del Monte M. Co. vs. Last Chance M. Co., Supra.*

There can be no possible controversy on the proposition so broadly and clearly stated. The Mineral Land Act, in so far as it gives extra-lateral rights is an innovation, to say the least of it, upon this fundamental principle of the common law. "No statute is to be construed as altering the common law further than its words import.

It is not to be construed as making an innovation on the common law further than its words import."

*Shaw vs. Merchants Nat'l Bank* 11 Otto 557, 25 L. Ed 893.

*Sullivan vs. LaCrosse Steam Jacket Co.* 10 Minn. 386.

*Wilbur vs. Crane,* 13 Pick 284.

*Dwelly vs. Dweely,* 46 Me. 377.

*Jasper Trust Co. vs. Kansas City et al R. Co.* 42 Am St. Rep. 79.

2. Another and all sufficient reason why the bounding plane must be drawn down from the point where the party has the whole apex, at the 108 foot plane in the case at bar, is the fact that the Mineral Land Act nowhere confers the right to follow a vein on its strike a single inch beyond any boundary line of a mining claim. In this case if the 133 foot plane is to prevail, you take the vein on its strike from the point where the hanging-wall crosses the west line of the Compromise Ground, (plaintiff's 108 foot plane,) to the point where the 133 foot plane intersects the foot-wall. No citation of authorities is necessary to sustain this proposition.

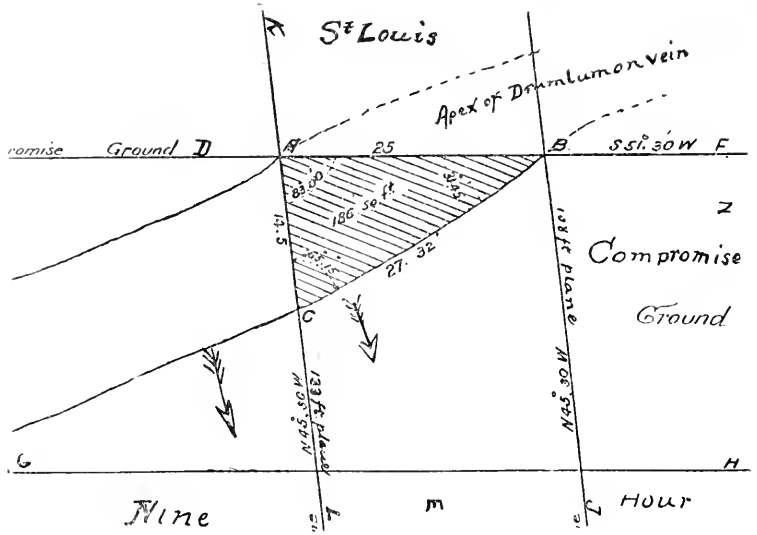
3. In the case at bar you take away from the defendant and give to the plaintiff a triangular portion of the surface of the Compromise Ground, bounded by the west line of the Compromise Ground, the 133 foot plane, and the line of the hanging-wall. In this case you take from us absolutely 168 square feet of our mining claim and give

it to the plaintiff. We submit that there is no provision of law which warrants this, and that it is directly contrary to the constitution of the United States, and the provisions of the Mineral Land Act. The section under consideration, Rev. Stats. 2322 which gives the extra-lateral right, expressly provides:

> "And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

By reference to the patent from the United States, issued to the plaintiff for its St. Louis Claim (Record p. 79) it will be seen that it contains, as do all Mineral Land patents, a reservation in strict conformity with this provision of the law.

We subjoin hereto a diagram showing the angle at which the Drum Lummon Vein crosses the west line of the Compromise Ground; the length for which the vein would be taken on its strike, and the form and amount of the surface which would be taken away from us under the decision of this Honorable Court as reported in the 104 Fed. It is from a photograph of the map (Defendant's Exhibit .....) drawn by the witness Farmer and sworn to by him to be correct and was introduced in evidence on the trial of the case.




The triangle A, B, C, shows distance taken on the strike of the vein, and the surface of the Compromise Ground taken.

The line D. F. is the west line of the Compromise Ground, and the lines G, H, is its East line.

The line I, J, is plaintiff's 108 foot plane, and the line K, L, is its 133 foot plane.

## MINOR ERRORS.

Our assignments numbered V, VI and VII relate to obvious errors but of minor importance. This case is too full of great questions, to spend much time on these minor errors. The question asked the witness on cross-examination was clearly a proper one and the court ought not to have sustained the objection made to it.

The map which is the basis of our assignment numbered VI and XII was just as clearly not admissible under

the proof (Record p. 58). Its admission and the passing of blue print copies of it, to the jury was reversible error.

*Story vs. Maclay,* 3 Mont. 480, affiirmed 4 Mont. 464.

*1 Greenleaf on Evidence,* Sec. 139 and cases Cited.

THE SPECIFIC PERFORMANCE CASE.

The assignments numbered VIII, XXI, XXXII, XXXIII and XXXIV all relate to the effect that should be given to the judgment in the Specific Performance Case (Record p. 81).

We have pleaded this judgment in our answer as a bar. In this case we fought out, to the court of last resort the question of the right to the mineral in the Compromise Ground. It was not only distinctly in issue in that case, but it was absolutely the main issue. We recovered a judgment and decree against the St. Louis Company in the District Court of Montana for the County in which the property here in controversy is situated, which awarded us the mineral contained in that ground without any qualification, or limitation whatever. If this judgment or decree was too broad, if it should have been limited to such mineral as was or might be found in veins having their apex wholly within the surface boundaries of the Compromise Ground, or if it should have excepted therefrom such mineral as was found in leads, lodes, or ledges, having their tops or apices in whole or in part within the surface boundaries of the St. Louis Claim,

it is sufficient to say that this reservation and this exception are not found in this decree. In this case and at the time this decree was made, the St. Louis Company was represented by as able, shrewd and careful lawyers, as were to be found in the State of Montana or in any other state of the Union. If this reservation, or this exception might properly have been included in this decree, it would have been there, beyond the preadventure of a doubt. It was not there and it was not put there, because we had fought that question to a finish and had shown the court that we were entitled to a deed, not only for the Compromise Ground, but for every last ounce of mineral it contained; that by express agreement the west line was an absolutely vertical line, and that we were entitled to everything lying east of it without regard to whether it was rock, sand, ore, mineral or what not. And that is the decree and the only decree that the court made, or could have justly made, under the testimony; and it not only made this decree, but it granted us a perpetual injunction restraining the St. Louis Company from ever asserting any claim to any interest in this ground or to any part or portion thereof. (Record p. 103). Whatever may be the claim as to the inclusiveness or ambiguity of the words "together with all minerals therein contained" in the original bond, it is very clear that when these words were put in the decree, even had they not been accompanied by a perpetual injunction precluding any claim of any kind within the bounded area, these words acquired a fixed, certain and definite mean-

ing, and without the injunction, but certainly with it, operate to award us every particle of mineral in this ground. That this is the undisputed meaning of such language in a decree seems to be absolutely determined by the case of *Bogart et. al. vs. Amanda etc., Mining Co.,* 74 Pac. 882, in which case, upon a bond not so favorable in its provisions, given likewise to settle an adverse claim, and followed by a specific performance suit, it was conceded on all sides that the decree, containing substantially this very language, meant precisely what we claim the language in this decree must mean. And it was insisted that because the decree operated, as we claim this decree must operate, it was erroneous as not warranted by the bond.

Our specific performance case was carried to the Supreme Court of the State and there affirmed, 20 Mont. 394, then carried to the Supreme Court of the United States, and again affirmed 171 U. S. 650. Now after having had a strenuous controversy of this kind, we come into court and plead this judgment as a bar to an action to recover damage for identically the same mineral, that has been adjudged by a court of competent jurisdiction to be our property and not that of the St. Louis Company, and it does not seem exactly right to have the court tell the jury in two lines of his charge, that our plea is unimportant and no further reference will be made to it. It seems as if we would be justified in feeling somewhat aggrieved if, after such a controversy, and in the face of such a judgment, this defendant in error, could collect a judgment of

$195,000 for mineral which had been thus solemnly declared to be our property. It certainly over-rules and sets at naught a long line of very respectable authorities. Whether this is the "law of the case" or not, we insist that the judgment in the Specific Performance Case is absolutely conclusive of the rights of these parties in the present action, and there is no possible escape from it.

*2 Black on Judgments,* 503-5.

Since the decision of the celebrated case of the Duchess of Kingston, the doctrine has been as stated and approved by the Supreme Court of the United States,

> "That the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court."

*Cromwell vs. Sac. Co.,* 4 Otto 351, 24 L. Ed. 198.

In order to make the former judgment a bar, it must be pleaded, not merely given in evidence.

*Freeman on Judgments,* 284. and cases cited.

The judgment or decree of a court of competent jurisdiction upon the merits, concludes the parties and privies to the litigation, and constitutes a bar to any new action or suit, involving the same cause of action, either before the same or any other tribunal.

*Casey vs. Pennsylvania Asphalt Pav. Co.* 109 Fed. 744.

*New Orleans vs. Citizens Bank,* 167 U. S. 371.

*Ball vs. Trenholme,* 45 Fed. 588.

Same Case affirmed, 114 Fed. 189.

Ala. *Tunkersey vs. Pettis,* 71 Ala. 189.

Ariz. *Reilley vs. Perkins,* 56 Pac. 734.

Fla. *Hoon vs. Felkel,* 7 Fla. 44.

Ill. *Stickney vs. Gourley,* 132 Ill. 213.

Ky. *Wallace vs. Mesher,* 4 Bibb. 508.

La. *Heroman vs. La. Deaf etc. Institute,* 34 La. Ann. 805.

Me. *Walker vs. Chase,* 53 Me. 258.

Md. *Walsh vs. Chespeake etc. Canal Co.* 59 Md. 423.

Mas. *Bigelow vs. Windsor,* 1 Gray 209.

*Foster Basted,* 100 Mass. 409.

*Jamaica Bond etc. vs. Chandler,* 121 Mass. 3.

Mich. *Sayers vs. Auditor,* 124 Mich. 259.

Minn. *Wisconsin vs. Toorins,* 28 Minn. 175.

Miss. *Aznew vs. McElroy,* 48 Am. Dec. 772.

Miss. *McKinney vs. Davies,* 6 Mo. 501.

Neb. *Spear vs. Tiddbell,* 40 Neb. 107.

N. H. *King vs. Chase,* 41 Am. Dec. 675.

Neb. *Dillon vs. Chi. etc. R. Co.* 58 Neb. 472.

N. Y. *Reynolds vs. Gamer,* 66 Barb. 310.

N. C. *Burnhild vs. Freeman,* 80 N. C. 212.

Penn. *Marsh vs. Pier,* 26 Am. Dec. 131.

*Cist vs. Zeigler,* 16 Am. Dec. 577.

*Bell vs. Allgheny Co.* 63. Am. St. Rep. 795 and note.

S. C. *Marigault vs. Holmes,* Bailey, 283.

Vt. *Porter vs. Gile,* 47 Vt. 620.

Va. *Howison vs. Weedan,* 77 Va. 704.

W. Va. *Burner vs. Hoener,* 26 Am. St. 948.

Wis. *Rosenow vs. Gardner,* 99 Wis. 358.

Our statute defines a judgment to be "The final determination of the rigths of the parties in an action or proceeding."

Mont. C. C. P. Sec. 1000.

"By such provision the state declares the legal effect and consequences of such a judgment; that it shall end the controversy as between the parties and end it forever."

*State vs. Savage,* 90 NW. 898; 91 NW. 557.

Where the facts averred and relied on are substantially the same, the fact that a different form or measure of relief is asked in the subsequent action, will not deprive parties of the protection of the prior findings and judgment in their favor.

*Green vs. Rogers,* 158 U. S. 478-502.

*Nat'l. F. & P. Works vs. Octonto,* C. W. S. Co. 113, Fed. 793-803.

Any right, fact or matter in issue and directly adjudicated upon, or necessarily involved in the determination of an action is absolutely *res adjudicata,* and cannot be relitigated between the parties or their privies whether the claim or demand, purpose, or subject matter of the two suits be the same or not.

*Burk vs. Beverley,* 1 How. 134.

*New Orleans vs. Citizens Bank,* 167, U. S. 371-396.

*Sou. Pac. R. Co., vs. U. S.,* 168 U. S. 1.

*Mitchell vs. Chicago First Nat'l. Bank,* 180 U. S. 471.

*Sou. Pac. R. Co. vs. U. S.,* 183, U. S. 519.

*Landen vs. Merc. Bank,* 186 U. S. 458.

*Russel vs. Lamb,* 49 Fed. 770.

*Norton vs. House of Mercy,* 101 Fed. 384.

*Estill Co. vs. Embry,* 112 Fed. 882.

*Eastern Bldg. & Loan Assn. vs. Welling,* 116 Fed. 100.

*Aetna L. Ins. Co. vs. Hamilton Co.* 117 Fed. 82.

Cal. *Green vs. Thornton,* 130 Cal. 482.

Conn. *Betts vs. Starr,* 13 Am. Dec. 94 and note.

Mass. *Baxter vs. New England Marine Co.,* 6 Mass. 277—4 Am. Dec. 125.

*Burke vs. Miller,* 4 Gray, 114.

*Chamberlin vs Preble,* 11 Allen 370.

*Burlen vs. Shannon,* 99 Mass. 200, 96 Am. Dec. 733.

*Stockwell vs. Silloway,* 113 Mass, 384.

*Sly vs. Hunt,* 159 Mass. 151, 38 Am. St. Rep. 403.

The same doctrine has been held by the Appellate courts in each of the following states, viz: Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, New York, North

Carolina, Oklahoma, Oregon, Pennsylvania, Vermont, Washington, West Virginia, Wisconsin.

Commentors upon *res adjudicata* have said it

"renders white that which is black, and straight that which is crooked *Facit ex curo rectum, ex albo nigrum,* no other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy".

*Jeter vs. Hewitt,* 22 How. 352.

"However numerous the questions involved in a suit, if they were tried and decided, the renewal of litigation for any of the same causes violates these cardinal principles of public policy, as much as if the suit presented but one single issue."

*Whitehurst vs. Rogers,* 38 Md. 503.

"The doctrine *judicium pro veritae accipitur* is dictated by wisdom and sanctified by age, and is founded on the broad principle that it is to the interest of the public that there should be an end of litigation by the same parties and their privies, over a subject once fully and fairly adjudicated."

*Martin vs. Evans,* 85 Md. 8, 60 Am. St. Rep. 292.

In *New Orleans vs. Citizens Bank,* 167 U. S. 371-398 the court quotes with approval the following:

"No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness.

*Cooley on Const.* Lim. p. 47 *et seq.* and authorities cited."

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court."

*Bigelow Estoppel,* 3d ed. Outline, pp. Lxi, 29, 57, 103.

"The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein."

*Aurora vs. West.* 7 Wall. 102.

For law of proof of *res judicata* see monograph note to *Fahey vs. Esterley Machine Co.* 44 Am. St. Rep. 562.

It is true that the judgment on which we so confidently rely, is the judgment of a State Court, but such judgments are distinctly within the purview of Art. 1 Sec. 4 of the Constitution of the United States, and Sec. 905 U. S. Rev. Stats. passed to carry the constitutional provision into effect. Judgments rendered in a state court are recognized as binding in the Federal Courts, and the same force and effect are to be given them, as they would have in the court wherein they were rendered.

In *Mills vs. Duryer,* 7 Cranch. 481, Mr. Justice Story declared:

"It remains only then to inquire in every case what is the effect of the judgment in the State where it is rendered."

Mr. Justice Miller in *Green vs. Van Buskirk,* 5 Wall 309 declares this to be the leading case on this subject, and cetrainly its doctrine has never been questioned.

*Mc Elmoyle vs. Cohen,* 13 Pet. 326.
*Christmas vs. Russell,* 5 Wall. 302.
*Green vs. Van Buskirk,* Ibid, 310.
*Crapo vs. Kelley,* 16 Wall. 637.
*Hilton vs. Guyot,* 151 U. S. 182.
*Mutual Life Ins. Co. vs. Harris,* 97 U. S. 336.
*Dow vs. Johnson,* 100 U. S. 186.
*Dillingham vs. Hawk,* 60 Fed. 498.
*Thompson vs. Whitman,* 18 Wall. 457.
*Hampton vs. McConnell,* 3 Wheat. 235.
*D'Arcy vs. Ketchum,* 11 How. 175.
*R. R. Co. vs. Wiggin's Ferry Co.,* 119 U. S. 622.
*Alkire Gro. Co. vs. Richesin,* 91 Fed. 83, et passim.

From all of this it will be understood that our contention, distinctly stated is, that what was the intention of the parties by the use of the words, "together with all the mineral therein contained," was fought out, as between these parties in the Specific Performance Case. That every issue in that case was expressly found against the St. Louis Company, and that every matter therein adjudicated is absolutely and forever determined.

## THE INTENTION OF THE PARTIES.

We confess to some embarrassment in discussing the question presented by our assignments of error, numbered from IX to XIX both inclusive. Of course, our theory already stated, is, that every question as to the purpose, contents, meaning, force and effect of the bond, Defendant's Exhibit "A" attached to its answer, was tried out, set at rest and forever disposed of, as between these parties, by the Specific Performance Case. If this is so, then the testimony offered to be proven by the several witnesses named in these assignments of error, was immaterial and was properly rejected by the Court. The Judgment in that case was a specific and perpetual bar to the relitigation of anything within the issues of the case.

If on the other hand the construction, intention, purpose and object of the bond for a deed yet remains the proper subject of litigation as between these parties, then the court below committed a most grievous error in rejecting this offered proof. This was the same line of proof, and substantially the same witnesses who testified in the Specific Performance Case, and they were in Court offering to testify to the same facts in this case that they had testified to in the Specific Performance Case. We submit that the Court was retrying this case upon the theory that nothing was settled as between these parties, except that we were to have a deed for the Compromise Ground. That what was meant by the words, "*Together with all of the mineral therein contained,*" had not been ascertained by the Court, nor had

the character of the west line of the Compromise Ground, whether it was the intention of the parties that this should be a vertical line, absolutely cutting off the right of either party beyond it, or whether it should be regarded as if it were simply the westerly claim line of the Nine Hour. In short, he was trying this case as if every question that was or could be raised, save and except our right to the deed, was absolutely at large. Under this view, the refusal to allow us to make this proof was absolutely the rankest kind of error, Nor was there any excuse for it, on the pretence that he was bound by "the law of the case." We did not offer these proofs on the former trial. We supposed that the judgment we were relying on, had the same potency and effect that other judgments have, and therefore we did not attempt to reinforce it by showing the circumstances surrounding the parties at the time they executed and accepted the bond for a deed, or by showing what was their definite verbal understanding which they supposed they had clearly expressed in the bond.

On refusing to permit the defendant to make this proof, the Court violated several of the best established principles in English jurisprudence.

These fundamental and established principles have been embodied in our Civil Code, and are as follows:

> "Sec. 2201. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

"Sec. 2203. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

"Sec. 2212. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

*McNeil vs. Shirley,* 33 Cal. 202.

*Creighton vs. Vanderlip,* 1 Mont. 400.

*Thompson vs. McKay,* 41 Cal. 221.

*Reiley vs. Smith,* 42 Cal. 245.

In the opinion which the Court held to be the only law he would look to in the trial of the case, these principles are clearly recognized. This Court says:

"In interpreting the conveyance in question, regard must be had not only to the terms, but the subject matter involved and the surrounding circumstances in order to ascertain the intention of the parties."

And again:

"All these antecedent circumstances leading up to and culminating in the deed, are properly considered in determining what was the intent of the parties to the contract."

102 Fed. Rep. 430-432-433.

And in harmony with this expressed view, your Honors in the 102 Federal proceed to consider such circumstances as the record then before you disclosed. As however, the plaintiff in error, relying on its contention that the language was not ambiguous and therefore not

the subject of interpretation, but conclusively determined the right to all mineral to be in the grantee had introduced no evidence other than the deed itself, and as the defendant in error had introduced only the judgment roll in the specific performance case,—though that was introduced for an entirely different purpose—and as the specific performance record made it appear as if the predecessors of plaintiff in error, by the bond in question, had gotten all the surface that they laid claim to in their adverse claim suit, your Honors were thereby influenced to conclude that it was not intended to pass minerals in veins apexing elsewhere, and this as you expressly say because had they tried and won the adverse suit they could not have won the apex of the vein in the St. Louis Ground. The record then before you was contrary to the actual facts; and this offered proof, among other things, would have shown that the plaintiffs in the adverse suit would have gained the entire apex of this Drum Lummon vein had they won the suit. Your Honors, in your opinion, say that the giving of the bond was a *confession* that the claim of the plaintiffs in the adverse suit was just. Had you then known from that record that that claim, if established, would have given them the whole apex, and that this was the only vein giving value to the ground, and that there never was any mineral in the ground, save mineral in ledge form and in this single vein, how differently you must have then viewed the language to be interpreted, and how readily, had you then been hearing evidence to interpret the conveyance, would you have

heard this proof as aiding you in interpreting this language in the bond. Yet the court, retrying this cause, refused to hear it, not because he did not consider it material and proper, if he had not been forclosed by your opinion, but for the sole reason that as he read your Honors' opinion you had declared that the language was unambiguous and that by force of the words themselves we were conclusively forbidden from claiming,or attempting to prove, that they were meant to pass mineral in a vein apexing without the bonded surface. It is hard to see how the trial court could have reached such a conclusion from reading your Honors' opinion, especially when an examination of the briefs of counsel on file in the case, and on which the case was heard, and argued, and submitted, conclusively showed that there never was any contention advanced to your Honors that the language was conclusive in favor of the St. Louis Company.—our contention being that it was conclusive in our favor, and the contention of the St. Louis people being that it was not so conclusive, but was uncertain enough to justify the receipt of extraneous evidence to interpret it, and that there was enough of such extraneous evidence in the record before the Court to compel the conclusion that the language should be interpreted favorably to their claim.

The refusal of the court to allow us to make this proof, was certainly not in harmony with either the spirit or the letter of the decision he professed to be following so closely. There is nothing in the opinion of your Honors' in the 102 Federal that could justify any one in

concluding that the views you expressed were not in perfect harmony with all the decided cases on the matter of interpretation of ambiguous language in an instrument, and certainly nothing that would excuse the conclusion that you had sought to put yourself in that opinion in opposition to all the decided cases, as you would be, if the interpretation put upon your opinion by the trial court was correct. We content ourselves in conclusion with citing the latest announcement of the principles of interpretation which must control in construing the language of this instrument, as declared in a case involving a conveyance of coal mining lands, in an opinion rendered April 27th of this year, by the Court of Appeals of Kentucky. One of the deeds there to be construed contained the following language, which, however, was in the habendum and not in the descriptive or granting clause:

> "together with the coal banks reserved by said George to himself in the deed made to J. B. George."

The other contained in the habendum clause a reservation as follows:

> "with the exception of all the coal banks."

The Court said:

> "The rule is that a deed is construed as any other instrument to effectuate the intention of the maker, and reservations or exceptions are enforced, although contained in the habendum clause of the deed, as fully as if set out in the granting clause, when on the whole instrument the intention of the parties is suf-

ficiently expressed to be enforced. Although the reservation in the deed from Robert George to James D. George is inserted in the habendum clause, it is so fully and clearly expressed as to leave no doubt of the intention of the parties that the grantor reserved all the coal banks on the lands, and held the right to them and the privilege of a way to the different coal banks with a wagon and team. It is insisted for appellees that the words "coal banks" must refer to a mine that has been opened, but it is agreed in the record, as a fact which we know to be true, that when the deeds were made the county was sparcely settled, there were no railroads, and no mercantile development of coal mines. In view of the entire language of the deed, and the circumstances under which it was made, when the grantor reserved all the coal banks, he referred to the veins of coal in the ground and not merely to such as had been opened. There had been little or no development of coal lands at that time, and the purpose of the grantor was to reserve the coal under the land.

It is earnestly insisted that in the deed from Robert George to Bruce there is a conveyance of only the four tracts of land, and that all that is said about the coal in that deed occurs in the habendum clause. The rule is relied on that the habendum clause will never extend the granting clause so as to make the deed cover property not included in the granting clause. But the rule referred to is not recognized by the more modern authorities, and is not enforced in this state. The modern rule is to read a deed as any other instrument."

*Jones et. al. vs. American Assn.*, 86 S. W. 1111.

It will, thus be seen that for the purpose of interpreting the phrase "coal banks" to determine whether it means developed mines or hidden minerals, the court con-

sidered the situation of the property, the general development of coal mines and settlement of the county, the presence and lack of railroads, and concluded from all these extraneous circumstances that the purpose of the grantor was to reserve all coal under the land. We offered similar proof as to the situation of this property and the development on it and surrounding properties, the knowledge of the existence of the apex of the Drum Lummon vein and that it lay within the adverse area, was known to dip into the ground described in the bond, and that it was the only mineral in that ground, and that otherwise the ground was worthless, all of which proof, most material and necessary, to the interpretation of the deed, the Court rejected. It is difficult to see how the parties, in the light of the fact conditions as they were known to exist at the time of the drafting of the bond, could have directed the scrivener to use language better calculated to express the idea they wished to convey than this language which our offered proof tended to show was chosen by the scrivener upon the direction of the parties, to express the very purpose that they then had in mind, viz: to pass all the minerals in the Compromise strip without regard to whereabouts of apex. See also.

*Bogart et. al. vs. Amanda etc. Mng. Co.* 74 Pac. 883, (hereafter quoted from under head of Estoppel by deed.)

*Brady vs. Brady*, 84 N. Y. Sup. 1119.

Even if the decision in the 102 and the 104 Federals had been "the law of the case", in the strictest sense of the term, it is well settled that new facts may be proved, which will relieve the case from the doctrine. That it was the express agreement of the obligor and the obligees named in the bond that in consideration of the large area of the Nine Hour Claim, which they were surrendering, that they were to have the Compromise Ground relieved of any apex rights of the St. Louis claim, was certainly a new fact, and a very improtant one.

> "It is well settled that such decision though unreversed and still binding as between the parties, is not the 'law of the case'. when on the second trial a new state of facts is established from what was established on the first trial. Where new facts are brought into the case it relieves the court below and it is not so conclusively bound by the decision of the Appellate Court, but it should apply the law applicable to the new and changed state of facts."

*Dodge vs. Gaylord,* 53 Ind. 365.
*Bloomfield vs. Buchanan,* 12 Pac. 238.
*Mitchell vs. Davis,* 23 Cal. 382. *et passim.*

In the case of E. A. Packer, 58 Fed. 249-254, a single new fact was sufficient to relieve the case of this doctrine.

Says Lacombe, C. J. in this case:

> "All the testimony in this case came before the Circuit Court on the second hearing and by the appeals brought before this court, and the existence of the very rule of the supervising inspectors which the Supreme Court refused to consider because it was

not proved, is now a fact in evidence. Under these circumstances, it was clearly the duty of the Circuit Court to pass upon the whole case, and in disposing of this appeal we are not constrained by the expressed opinion of the Supreme Court upon the incomplete case which that tribunal had before it."

The reversal of a judgment destroys its efficacy as an estoppel.

2 *Black,* sec. 511 p. 611.

1 *Wharton on Evidence,* 781.

These authorities might be supplemented by very many more. Indeed an examination of the numerous cases, bearing upon this proposition, will convince the Court, that the refusal to permit competent testimony of this character to be given, is of very rare occurence.

## ESTOPPEL BY DEED.

We have pleaded an estoppel in our answer in this case, based upon the bond, the judgment and the deed. So far as the deed itself is concerned, it is always to be borne in mind that it was not a voluntary one. It was only made by the defendant in error, because under the decree of the Court, and the Statutes of Montana, it had to be made before an appeal could be taken to the Supreme Court of the State. The defendant in error had filed an answer in the Specific Performance Case, in which it denied that we were the successors of William Robinson and other locators of the Nine Hour; that we were the owners of the Compromise Ground, or were in possession of the same,

or entitled to the possession of the same, or *the mineral therein* then or at any other time, and they avered that the said Compromise Ground was then and always had been a part of the St. Louis Claim, originally located as such, and that it was not and never had been any part of the Nine Hour Claim. It admitted the adverse proceedings and suit, and the execution of the bond by way of a compromise, but it avered that such adverse claim was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to his St. Louis Mining Claim, and that said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience. These vital issues were fought through to the court of last resort as already stated, for the purpose of preventing the delivery of the deed, which in the meantime was held, under the statute, by the Clerk of the Court. Nothing can be predicated therefore upon the deed. So far as the grantor was concerned, it was his intention that it should not be delivered to us, if its delivery could be prevented. On the other hand, it was the intention of the grantee to compel a delivery which it ultimately and after a long struggle accomplished.

But is not the bond which is in substance, a deed, a complete estoppel in this case, even on the Court's theory, that the words, "together with all of the mineral therein contained", are absolutely meaningless? Of course in the construction of this bond, these words must be found to have a meaning, and their meaning must be held to be

exactly what the parties intended and agreed that they should mean. One of the first canons of construction is that effect must be given to every part of the contract, if possible, that is unless the stipulation is found contrary to law or morals.

*Evans vs. Sanders,* 8 Porter, 497.
*Richardson vs. Palmer,* 38 N. H. 212.

But let us leave this feature entirely out. Suppose the bond had said nothing about the mineral, but had stipulated to convey the Compromise Ground to us by metes and bounds. What then would have been the respective rights of the parties? It cannot be doubted that we would have had all that the Court wants to give us under the bond, we took, viz: all mineral found in veins having their tops or apices within the surface boundaries of the ground thus conveyed. But how would it have been with the St. Louis Company? Would it have been entitled in the absence of any reservation of extra-lateral rights in its deed, to have followed into the ground thus conveyed such portion of the vein as had its apex within the surface boundaries of the St. Louis Claim? It is to be remembered that this is a conveyance by metes and bounds, a conveyance of everything within those surface boundaries, unless it be a vein having its apex within that portion of the St. Louis reserved by it, and why not of this as well, unless reserved by fitting and appropriating language in the conveyance?

The doctrine of extra-lateral rights is clearly in con-

travention of the common law. There is nothing in the statute giving the right of lateral pursuit any of the qualities of a covenant running with the land, or making it inalienable except in express terms. It would seem to follow that unless this right was preserved in the deed by fit and appropriate words of exception from the grant, everything contained in the land would pass by the deed and the grantor would be estopped from thereafter asserting this right as against his grantee. The Government of the United States occupies no different plane, when it comes to dealing with its real estate, than does any other owner of that species of property. When it comes to make a conveyance, *i. e.,* a patent of a mining claim, it does two things with reference to extra-lateral rights. First, it conveys to its grantee the right to pursue the vein found within the surface boundaries of the claim in its downward course, though it passes under the vertical side lines of his claim and into the premises adjoining; and secondly, in express language it excepts from the grant made, and reserves to an adjoining owner the right of extra-lateral pursuit. If the reservation is necessary in a patent in order to give an adjoining owner this right, or if unnecessary in a patent, it is only so because the reservation has already been made by statute, then it is equally necessary in a deed from an individual and a grantor not reserving it would be thereafter estopped by his deed from asserting it against his grantor.

It seems to us the case of *Stinchfield vs. Gillis,* 107 Cal. 86; 40 Pac. 98, is in point upon this proposition.

"The effect of the deed from Gillis to plaintiff was to estop him and those claiming under him from questioning the title of the plaintiff to all the gold that might be found in the West vein, within the surface line of his deed. The gold in controversey was found within the surface lines of this deed, and it was also found within the limits of the two walls forming the West vein, although the place at which it was found is also within the lines of the walls which form the Rice vein. This latter circumstance does not, however, relieve Gillis from the estoppel of his deed, for, as the *deed contains no reservations,* and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms by holding that the entire West vein within the surface lines, even though intersected by another, passed to the plaintiff."

The facts in this case are found in the opinion of the Court on a former appeal, 96 Cal. 400; 30 Pac. 839. On and prior to January 17, 1886, Gillis was the owner of the "Carington" claim. On that day he sold to Stinchfield a portion of his claim known as the Pine Tree Mine, conveying the same to him by a simple bargain and sale deed. At this time one Rice was working on a portion of the Carrington claim not included in the sale to Stinchfield, which was known as the Rice vein. The apices of the two veins, called respectively the "West" vein and the "Pine Tree" vein, were within the surface boundaries of the "Pine Tree" claim, while the apex of the Rice vein was on that portion of the claim not sold to Stinchfield. Immediately after the sale to Stinchfield, Gillis made a new location on the part not

sold, and a few days afterwards Stinchfield also made a new location on the part of the claim he had purchased from Gillis. In other words, both parties abandoned the "Carrington" location, and each for himself made a new location of his part of the claim, Gillis being the elder. Rice, who was working for Gillis, followed his vein down to where it intersected the "West" vein, under the surface conveyed to Stinchfield and removed ore at that point of the intersection of the two veins, of the value of about $10,000. Stinchfield brought suit against Rice and Gillis to recover for this trespass, and notwithstanding his was the junior location, recovered judgment. Under the provisions of Sections 2336, U. S. Rev. Stats., providing that all ore in the space of the intersection of two veins, shall belong to the prior locator, Gillis would have been entitled to the ore but for the estoppel created by his deed. If one right of this character conferred by the statute, may be thus lost, another right of the same character may be lost in the same way.

We wish now to invite the attention of the court to the case of *Bogart et al vs. Amanda etc., Mining Company,* decided by the Supreme Court of Colorado, December 7th, 1903, and reported in the 74 Pac. Rep. 882 et. seq. The action was to enforce specific performance of a contract to convey mining ground. The contract was made to settle an adverse claim between the Amanda and the Bogart lode claims and by it the owners of the Bogart agreed after the issuance of patent to convey "the surface ground included within the conflict, saving and ex-

cepting from said deed so to be made, the Bogart vein, lode, ledge or deposit, wherever the same may be found to cross or pass through the conflict surface." The decree directing specific performance of that contract expressly required the defendants to convey all the territory in the conflict "including all the minerals below the surface saving and excepting the Bogart vein". It will be noted that the bond contract there involved was limited to surface ground, but excepted a single vein, yet, upon that bond contract the court below decreed a conveyance which should expressly include all the minerals beneath the surface, save only the excepted vein. It was contended that the bond only obligated the Bogart owners to convey surface grounds without minerals; that the expression "surface ground" had a distinctive meaning in mining regions and could not be interpreted to include any minerals below the surface. Speaking of this the Court said:

> "Unquestionably, in mineral land there may be a severance of estates; the mineral constituting a separate corporeal hereditament, capable of distinct conveyance from the surface or the soil, each estate being in separate owners. But it is also true that, until there has been a severance, ownership of the surface carries with it ownership of the minerals beneath the surface. As expressed in 1 *Lindley on Mines*, at section 2, under the common law minerals were the property of the owner of the land, the property on the surface carrying with it the ownership of everything beneath and above it; and this prima facie ownership continued until rebutted by showing that ownership of the mines and minerals had be-

come in fact several and distinct from the ownership of the soil or surface. See also *Barringer & Adams on the Law of Mines,* p. 4. In 2 *Washburn on Real Property* (6th Ed.) Par. 1318, the learned author says: 'Whoever owns the surface is presumed to own and would originally actually own whatever minerals there might be beneath the surface, until he shall have granted away the one or the other, and thus separated their ownership.'

What was the intention of the parties at the time they made this agreement? If there is any ambiguity in the language employed, it must be resolved in favor of the grantee and against the grantors. The object of the court should be to place itself, as nearly as possible, in the position of the parties at the time, and from the terms of the contract and the surrounding circumstances arrive at their meaning. We do not think there is any difficulty in ascertaining this intention from the language of the written agreement. While there may be two distinct ownerships in mineral land,—one of the surface or the soil, and the other of the minerals underneath,—we are satisfied that by this agreement the applicant for the patent for the Bogart claim intended to convey to the owners of the conflicting location not merely the surface ground in conflict, as contradistinguished from the mineral beneath, but with this surface ground all underlying minerals except the Bogart vein."

Here not only was the reservation held to be necessary to carve out the Bogart vein, but the reservation was held to be operative to interpret the words "surface ground" in the bond as comprehending all minerals save the reserved vein.

The effect of the conveyance of a part of a mining

claim on the extra-lateral rights of veins found in the part not conveyed, is shown after a fashion in article VI, 2 *Lindley on Mines,* Sec. 616 et seq. He cites this case from 102 Federal and though he expresses no opinion, he seems to approve the doctrine that extra-lateral rights may be maintained for veins apexing in the unconveyed portion of the claim, and that in order to make conveyances of the extra-lateral right, there must be a specific designation of it. The other cases cited by him except Stinchfield against Gillis and Central Eureka M. Co. vs. Toman do not touch the question. Stinchfield vs. Gillis *et supra* as already explained is only in point so far as it establishes the fact that one right given by the Mineral Land Act may be lost by a conveyance of a part of a claim unless it is properly reserved or excepted out of the portion of the deed of conveyance.

The case of *Central Eureka M. Co. vs. Toman* referred to by the author will be found cited under the title of *Central Eureka M. Co. vs. East Central Eureka M. Co.,* 79 Pac. 834, and this supports our contention.

The plaintiff was the owner of the Summit quartz mine which had been located and patented under the law of July 26th, 1866, 14 Stats. 252, the patent purported to convey the lode, for a given distance on its strike througout its entire depth although it might enter the land adjoining. Subsequently the defendant, Toman took up a ranch adjoining the Summit lode, and into and under which the vein, on its dip, extended. Some controversy

arose between the plaintiff and the Tomans, and to settle this the plaintiff gave the Tomans a quit claim deed, not for any part of the Summit mining claim, but for the premises "lying east of that certain patented mining ground known as the Summit Quartz Mine". The deed also purported to be a release of the Tomans from all claims, bonds or contracts made by the Tomans to it or its predecessors, and particularly from any covenant in an agreement between the parties dated October 23rd, 1897. Though it is not so stated in the opinion, it is most likely that the Tomans had given the plaintiff some contract or agreement to convey some part of the Toman ranch to it, which had been placed upon record, and that the intention of the parties was to release this agreement by means of the quit claim deed which would be recorded, and the record made straight. Under this deed, the defendant was claiming the ore found under the surface of the Toman ranch. The court thus states the contention:

> "Defendants, relying upon the well recognized principle that a conveyance of land, IN THE ABSENCE OF EXPRESS RESERVATION, carries not only the surface of the earth, but everything under it, and over it, *including the minerals therein contained,* claim that the effect of this deed was to convey to the defendants the portion of the vein here in dispute. As the plaintiff was at the date of the deed the owner of such portion of said vein, such must be held to be the effect of the quit claim deed *if the description in the deed includes the same.*"

The capitals and the italics are ours. The court cor-

rectly holds, we think, that the description did not contain any part of the Summit Quartz Mine. That the vein under the Tomans surface was as much a part of the mine as anything within the surface boundaries of that claim and hence was not conveyed.

A very pertinent part of this opinion, so far as the proposition we are now considering is concerned, is the following:

> "A very different case would be presented, if we were dealing with a deed which contained a conveyance of a parcel of land simply by *metes and bounds*, or a deed which purported to *convey all lands* lying east of a certain defined surface line. We have no such deed here, but one which in terms limits its operation to such portions of the designated sections, as lie east of the mining ground of plaintiff, Taking into consideration simply the character of plaintiff's property, we are of the opinion that the deed does not purport to convey any portion of any vein that had its apex within the surface lines of plaintiff's location so far as it lay between the converging end lines of plaintiff's claim."

The quotation made by the author from the opinion in the case of M. O. P. Co. vs. B. & M. Co., 27 Mont. 288 would seem to be in point but an examination of the case will disclose the fact that the reverse of the proposition we have to deal with, was there under consideration. The question in that case was not, were extra-lateral rights excepted from, but were they included in, the grant. The court very justly, as we think, finds they were included in the grant. A rehearing was granted in the case, and the

opinion of the court is found in the same volume, page 356. Both opinions should be read in this connection, and from both it will be seen that the question we have to deal with is not determined.

## IN MONTANA.

It may be confidently asserted that in the State of Montana, a conveyance of a portion of a mining claim by metes and bounds, or generally by definite surface lines, without any reservation to the grantor of extra-lateral rights for the portion of the claim not conveyed, is a conveyance of extra-lateral and every other right which he had in the portion of the claim so conveyed. The court will clearly understand our position. We say that the bond for a deed given our predecessors in interest, if it had not contained the words, "*together with all of the mineral therein contained,*" would have conveyed to us, all the mineral in the ground, and that extra-lateral rights of the St Louis claim would have been cut off at the westerly side line of the Compromise Ground precisely as they are now. In this sense the court is right in saying that these words neither add to or take away anything from the deed. In this case, it was the express agreement between the obligor and the obligees named in the bond, that the west line of the Compromise Ground should be an absolutely vertical line, and that the obligor should relinquish any and all claim he might have to everything lying to the eastward thereof. As expressing the intention of the parties, at the time and as showing that there was to

be no reservation in the deed of extra-lateral rights for veins found within the St. Louis claim, these words were used,but they were not indispensibly necessary to convey extra-lateral rights.

Entering into the bond and a part of it, and of the deed, which the obligor agreed thereafter voluntarily to make and deliver, was the statute of the State (then Territory) of Montana, a part of which was the following:

> "That the common law of England, so far as the same is applicable, and of a general nature, and not in conflict with special enactments of this territory, shall be the *LAW* and the *RULE OF DECISION,* and shall be considered of full force until repealed by legislative authority.". Act of June 2, 1872.

*Trry. vs. GeWan,* 2 Mont. 429.

*Trry. vs. Va. Road Co.,* Ibid 194.

*Butte Hardware Co. vs. Sullivan,* 7 Mont. 312.

*Palmer vs. McMasters,* 8 Mont. 192.

*Milburn Mfg. Co. vs. Johnson,* 9 Mont. 541.

*Forrester vs. B. & M. Co.,* 21 Mont. 544, 557.

Other statutory provisions bearing upon this question are as follows:

> "A transfer vests in the transferee ALL the actual title to the thing transferred which the transferer then has, unless a different intention is expressed or necessarily implied."

Mont. Civil Code. Sec. 1490.

> "The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer

of an incident to a thing does not transfer the thing itself."

Ibid Sec. 1491.

"A grant is to be interpreted in favor of the grantee."

Ibid Sec. 1473.

"A transfer of real property passes all easements attached thereto."

Ibid Sec. 1510.

"A fee simple title is presumed to be intended to pass by a grant of real property."

Ibid Sec. 1511.

"Every grant of an estate in real property is conclusive against the grantor."

Ibid Sec. 1513.

What is there in the statutes of Montana, or in the statutes of the United States, to prevent a deed for a part of a mining claim taking effect as a common law deed, and conveying to the grantor therein named, everything within the defined surface boundaries extended downward vertically? Where and when and how has the common law, thus solemnly adopted and declared,been altered or changed in the State of Montana? True, extra-lateral rights are conferred upon the miner by an act of Congress, but after he has secured them by virtue of his compliance with the provisions of the Act, they belong to him, and he can convey them in any way he sees fit. When he has conveyed, and how he shall convey them, are questions that can only be determined by the laws of the State in which the mining claim is situated.

## EUREKA CASE.

In the celebrated Richmond Eureka case 13 Otto, 839, Mr. Chief Justice Waite, who had never seen a gold or silver mine until he visited Montana, who had never had any practical experience in the trial of mining cases, says: "In establishing this line it is to be presumed that the parties had in view the peculiar character of the property about which they had been contending."

And again

> "The language used is to be construed with reference to the peculiar property about which the parties were contending."

This language has been held in some courts, particularly at *nisi prius,* to justify the conclusion that the extra-lateral right would not pass, except the deed contained the clearest sort of language showing that it was the intention of the parties that it should pass. In the case at bar, in the opinion found in 102 Federal, your Honors say:

> "To manifest such an intention the terms of the contract and the conveyance would under the circumstances, need to be clear and explicit. The use of the words, "together with all the mineral therein contained," is not sufficient."

Very evidently your Honors in this refers to the "peculiar property," already mentioned in the preceeding part of your opinion. But is there anything in this, or elsewhere in the Richmond Eureka case, that will justify the conclusion that an extra-lateral right will not

pass, unless the language of the deed is clear and explicit? That no difference what may be the law governing conveyances in the jurisdiction in which the mining claim is situated, a conveyance that does not in clear and explicit terms show that it was the intention of the grantor to part with all of the mineral contained in the ground conveyed, without regard to where the apex of the vein in which such mineral was found might be, is insufficient to convey the grantors extra-lateral rights, to veins having their apices in the portion of the claim retained by him? The case in the Circuit Court is found reported in 4 Sawy. 302. It was tried before Mr. Chief Justice Field, and Judges Sawyer and Hillyer, whom Mr. Lindley says were "three of the most eminent mining judges of the west." 2 Lindley on Mines Sec. 576. The opinion is by Field, and is universally recognized by both the bench and the bar of the Pacific Coast as being one of the clearest and strongest opinions ever written by that great jurist. Every proposition decided in it was novel, absolutely questions of first impression. It has stood the test of time. Not a single principle announced in it, has been over-ruled, denied or even doubted by any court in the land, in the 28 years that have elapsed since its rendition.

There is one significant fact in connection with this opinion to which we especially wish to direct the court's attention and that is, that in this learned and able opinion of Mr. Justice Field, the "peculiar property" or the "peculiar character of the property" idea, finds no place or lodgement.

So far from either opinion being any authority upon the question of how, or when, or by what words or phrases extra-lateral rights will be conveyed, both the opinion in the Circuit Court, and that of the Supreme Court are silent, and ignore the doctrine of extra-lateral rights. At page 820, 8 Fed. Cas. where the case is reported, a better map of the claims in controversy is found than that shown by Mr. Lindley. Referring to this, it will be seen that the line established by the agreement of the parties, starts at the northwest corner of the Nugget anl thence runs diagonally across the westerly end of the Champion to where it intersects the common end line between the Champion and Richmond, thence it extends northerly on the common end line between the "At Last" and the "Lookout", and along the west end line of the "Margaret" to the point at X and thence it was continued in the same direction by the opinions of the courts, to the point C. Looking now at the diagram it will be seen that there are croppings on the west end line of the "Richmond" the line common with the last named claim and the "Tip Top", and croppings are shown again about the center of the "*Champion,*" so that the apex of a vein must have passed through the diagonal southwest corner of the "Champion," cut off by the line from point W. to the northwest corner of the "Nuggett." This triangular southwest corner of the "Champion" under the terms of the agreement, was the property of the Richmond Mining Company, and following the vein on its dip, between the points where the apex passed through the hypothen-

use and perpendicular of the triangle, it would have led down into the Potts Chamber and given the ore in dispute, or the greater part of it, to the Richmond Company. No notice whatever, of this significant fact is taken by either the Circuit or the Supreme Court, and the controlling thought of both opinions is the established line.

But again, out-crop is shown in the diagram on both the "At Last," and the "Margaret" belonging to the Eureka Company. Suppose the apex of the veins in each of these claims followed on their dip would have led down into the Potts Chamber, why would it not have been all sufficient for the court to have said, "The plaintiff has the apex of the vein in its "At Last" or its "Margaret" claim, or in both, and this apex on its dip leads to the Potts Chamber, therefore the ore in that chamber is its ore. On the contrary the doctrine of extra-lateral rights for any of these claims is ignored in the opinions of both courts, and in both the validity and construction of the agreement of the parties is the determining factor.

## PRIORITY.

And here we may fittingly pause for a brief moment, to consider the doctrine of priority of location. Suppose that from each of these claims, the Champion triangle belonging to the defendant, and the "At Last" and "Margaret", belonging to the plaintiff, veins sufficiently continuous on their dip to be followed by a miner, led down into the "Potts Chamber" and that the rights of the parties was to be determined by

the law of the apex. Then clearly the old maxim, *"qui prior est tempore potior est jure"* ought to prevail, and the first party, to make a valid location in point of time should be awarded the ore from the "Potts Chamber." Perhaps this might be true under the conditions as they actually existed in the ground. These conditions are very graphically set forth by Mr. Justice Field in the beginning of his opinion. There was there, in point of fact, a great mineral bearing zone of metamorphosed limestone. The foot-wall was quartzite some hundred of feet in thickness. The hanging or northerly wall, was a belt of clay, or shale, ranging from an inch to seventy or eighty feet in thickness. At the east end in the Jackson mine, the quartzite and shale approached each other separated by scarcely more than an inch of talc. From this point going westerly the walls diverged until on the Eureka they were five hundred, and on the Richmond about eight hundred feet apart. Between these two walls was brecciated limestone irregularly mineralized. In places, in little vugs and caverns in the lime there were valuable mineral deposits. In places these mineralized portions were very rich and quite extensive; in other places less so, and in other places it was so slightly mineralized as that its mineralization was so little as to be scarcely perceptible. There was no continuation of the fissures either on strike or dip which a miner might follow,either with the certainty or reasonable hope that it would lead him to other bonanzas. In short precisely the same condition prevailed in this case which is usual-

ly encountered in almost every other case, where either gold or silver is found in lime dikes. This and nothing more was what Mr. Chief Justice Waite meant when he spoke of the "*peculiar character of the property.*" It was a broad apex, one great mineral zone, too wide for a single location, and upon which several locations might be made. What would be the relative rights of senior and junior locators on such a zone has not been ultimately determined.

In the case at bar, priority of location cuts no figure. By agreement it was patented as a part of the St. Louis location, and it cannot be claimed that one part of a mining claim can have priority over another part of the same claim. So far as the two blocks 5 and 10 are concerned they were of no value, the ore found in them being too low in value to pay for milling. These two blocks are the only ones lying east of the east side line of the Compromise Ground.

But suppose the Nine Hour was the senior location. What difference would that make with the right of the St. Louis Company to pursue on its dip, any vein having its apex within the St. Louis surface? Not a particle—since all such veins are expressly excepted out of the Nine Hour patent and are included in the St. Louis patent. True if the doctrine announced in the opinion found in the 102 Fed. is to prevail the conditions therein found would be exactly reversed. We would have a portion of the apex from B. to A. (Fig. 2) within our surface, and would be entitled to the same surface and same rights in the St.

Louis claim, which that decision awards to the St. Louis in our Compromise Ground. It is respectfully suggested that this is not the law.

## PECULIARITIES IN THIS CASE.

There are peculiarities about every mining property, and peculiarities about every mining case. The case at bar is no exception to this rule. For example it is clear from the record in this case that the greater part of the present St. Louis claim was originally the "Ivanhoe" owned jointly by Mr. William Mayger, whose other name is the St. Louis Mining & Milling Company of Montana and Mr. Nathaniel Collins, the discovery vein of which was the *vein* found in the south drift of the Transcontinental tunnel. (Record p. 52-53).

That Mr. William Mayger through his brother Charles caused the "Ivanhoe" location to be jumped and the St. Louis claim to be located. (Record p. 52).

That pursuant to the written direction given to him by his brother William by letter from Butte, Montana. Mr Charles Mayger did locate the St. Louis claim. (Record p. 51).

That the discovery vein upon which Mr. Charles Mayger made the location was the vein found in the sixty-five foot shaft. (Record p. 52).

That the location thus made by Mr. Charles Mayger was a perfectly regular parallelogram of the regulation size fifteen hundred feet in length by six hundred feet in width (Record p. 119 et seq.), that its so-called side lines

were perfectly straight lines, and that it was not the hexagonal figure shown in the diagram contained in its patent. (Record p. 279).

That as originally located and staked, it did not include a single foot of the Drum Lummon vein within its surface boundaries.

That when the Nine Hour was subsequently located, its westerly line did not reach the easterly line of the St. Louis by about fifty feet at one end and twenty-five feet at the other end. (Record p. 121).

That when the St. Louis was surveyed for patent the east line of that claim was wrongfully extended to the eastward and over the Nine Hour surface from corner No. 1 of the St. Louis to what is now corner No. 2 of that claim, and from the corner last named to corner No. 3 of that claim, and embraced an area of the Nine Hour claim of 1.98 acres, a part of which is the Compromise Ground. (Record p. 119).

That the portion of the Nine Hour so wrongfully jumped by the Maygers and included in their St. Louis location, included about six hundred lineal feet of the apex of the Drum Lummon lode, and included the portion thereof for which the plaintiff is now claiming extra-lateral rights in the Compromise Ground, and the Nine Hour. (Record p. 121).

That in the settlement of the adverse proceedings and suit, brought by the owners of the Nine Hour in consequence of this wrongful overlap the Maygers agreed in the bond for a deed to convey a strip of ground, the west

line of which was to be parallel to the surveyed line of the St. Louis between corners Nos. 2 and 3 and fifty feet distant from the center of the Discovery shaft at right angles to said survey line. That the west line of the Compromise Ground is only about forty feet so measured from the center of said Discovery Shaft. (Record p. 123).

There are other peculiarities set out in the proof offered to be given by Robinson, Decamp, Sterling, Eddy and others relating to the verbal understanding of the parties, which should be weighed and considered, in determining whether the extra-lateral rights of veins in the St. Louis were intended to be conveyed by the words found in the bond relation to the mineral contents of the Compromise Ground, and whether the parties thereto understood them to be so conveyed.

In a way we have digressed a little from the proposition we set out to maintain, viz. that in the State of Montana, a conveyance of a specific portion of a mining claim, the grantor not reserving in his deed by fit and appropriate words, extra-lateral rights for veins having their apices in the part of the claim not conveyed, loses the same, and that no reservation of this right can be implied by reason of a mining claim being "peculiar property." That, in short, a reservation in the deed is necessary to retain them, and that absolutely no description of them in the deed is necessary to convey them. This seems to be true in Colorado as well as in Montana.

The case of *Bogart vs. Amanda Consol. Gold Mining*

*Co.*, 64 Pac. 882, is directly in point on this question. We quote as follows:

> "Unquestionably, in mineral land there may be a severance of estates; the mineral constituting a separate corporeal hereditament, capable of distinct conveyance from the surface or the soil, each estate being in separate owners. But it is also true that, until there has been a severance, ownership of the surface carries with it ownership of the minerals beneath the surface."

We really feel as if we should beg pardon of the court for having discussed this simple question at such length. We have spoken of Montana, California and Colorado as states wherein the rule obtained as if they were or might be exceptions. They are not. Wherever the common law is the law, and the rule of decision, it must follow that all the mineral contained in the ground conveyed will pass to the grantee. If the grantor wishes to retain such rights for veins having their apices in that portion of the claim reserved by him, he must except them in his deed precisely as the United States does in its patents.

## ASSIGNMENT XX,—THE AMENDMENT.

This suit was originally begun September 16th, 1893, for ore extracted prior thereto, averred to have been of the value of $200,000.00. Thus the pleading remained until November 21st, 1898, when by a so-called amendment, it was alleged that between September 16th, 1893 and the latter date additional ore of the value of $50,000.00 had been extracted; and during the former

trial, in August '99, this amendment was itself amended by merely changing the last date to June, 1899. Thus, under the pleadings as they stood until the amendment now complained of during the present trial, plaintiff could have recovered but $50,000 for ore extracted after September 16th, 1893, if, in this action, he could be permitted to recover anything for ore dug after the suit begun.

Plaintiff's evidence showed indisputably that every block of ore except blocks 8 and 10 lay between the 108 and the 133 foot planes, and that all the ore extracted between these planes was dug either in the years 1898 or 1899; the defendant's evidence confirmed this. Block 8, by the uncontradicted evidence was extracted in the year 1898, and but $18,626 of value was claimed by plaintiff for block 10. Thus, plaintiff's recovery must have been limited to $18,626 for ore extracted before September 16th, 1893, and $50,000 after, or $68,626 all told.

As plaintiff in its case in chief offered its proofs of ore extraction and value—block by block as offered, objections were interposed and exceptions taken by defendant, each presenting the question of the limit of recovery under the pleadings, as well as the further point that plaintiff's proofs left it uncertain as to many of the blocks how much was extracted before and how much after June 1899, and as to 10, how much was extracted before and how much after September 16th, 1893. This left no room for the contention on motion to amend that it was proper to make the pleadings conform to proofs

received without objection. (See Assignment of Error, VIII.)

Near the close of this six weeks trial, without any support by affidavit, showing, or otherwise,—though the pleadings verified by the personal oath of the Manager and chief fact witness of plaintiff Company had stood in this condition for over six years since the last extraction of ore had occurred, and nearly two years since the remittitur had been filed, and though the evidence disclosed that under court orders they had in the year 1899 measured up and assayed all areas of extraction between the planes, and that all their proofs on trial were predicated on the knowledge then gained, and they had gained no new knowledge since, and though their attention had been called to the condition of their pleadings during the entire production of their proofs,—the court, nevertheless, allowed them against our objection to amend the amount of $50,000 to $400,000, and to thereby carry the date forward from June '99 to the time of the amendment itself, thus obviating their failure to show how much was before and how much after June 1899.

The objection was again in part preserved by the last ground assigned in our motion for verdict. (See Assignment XXI): and by our offered instructions numbered XXXVII, XXXVIII, XXXIX, XLI and XLII —each refused by the court and each refusal made the subject of assigned error.

We insist:

(1st) That the amendment was not allowable be-

cause it was a new cause of action, since no recovery could be had in this suit for a single pound of ore dug after its commencement.

(2nd) That there was no waiver on our part merely because they were allowed by the court to make the amendments of November 1898 and August 1899.

If, however, it could be claimed that this was a waiver, it only extended to the value then alleged, and could not operate on the future; and that the doctrine that you may amend the ad dammum, would only apply to what might without waiver be recovered for in the action, i. e. to the amendment of the $200,000 damage allegation as to ore extracted September 16th, 1893.

> "The cases are decisive that by the common law a plaintiff can recover damages only to the time of the bringing of the action."
>
> *Powers vs. Ware,* 4 Pickering 107.

> "If it continues afterward, the damages resulting therefrom can only be recovered by a new suit, and they may be so recovered, for every continuance of the nuisance is a new nuisance. In such subsequent action all damages for such continuance since the commencement of the prior action are recoverable."
>
> *Sutherland on Damages,* par. 1038.

> "The right to recover prospective as well as existing damages in an action depends usually upon the answer to the test question whether the whole injury results from the original tortious act, or through the wrongful continuance of the state of facts produced by these acts.
>
> *Ridley vs. R. R.* 32 L. R. A. 709.

"If in fact it is continued during the pendency of the action, it is a wrong not in issue; it is a new wrong and the resulting damage is a fresh cause of action."

*Sutherland on Damages,* par. 1039.

"In trespass and in tort new actions may be brought as often as new injuries and wrongs are repeated and therefore damages shall be assessed only up to the time of the wrong complained of."

*Robinson vs. Blond,* 2 Burr 1077.

"The rule is thus tersely stated in *Warner vs. Bacon,* 8 Gray, 397; 6 Am. Dec. 253: 'A fresh action cannot be brought unless there be both a new and unlawful act and fresh damage.' This rule is illustrated by many cases."

*North Vernon vs. Volger,* 103 Ind. 314.

"If an injury to land proceeds from a cause which is only temporary in character and abateable, it constitutes a continuing nuisance for which the injured party may maintain an action as often as he suffers damage, each action being limited to the injury sustained by him up to the time of the bringing of the action."

24 Enc. Law 2d Ed. 791.

"For a permanent injury to or trespass upon real estate all damages caused, present and prospective, are recoverable in one action. * * * * Where, however, the injury or trespass is only temporary in character, only such damages are in general recoverable as have occurred up to the date of the institution of the action, for subsequent damage successive actions being maintainable. The

reason for this distinction is that the law will not presume the continuance of the latter class of wrongs, but rather, as they are of a nature temporary and remediable, will suppose their discontinuance and abatement after the recovery of any damages therefore. And if in such cases all damages were recoverable in a single action, and successive suits could not be maintained, the verdict and judgment in the first action would operate as a virtual purchase of the right by the defendant to do that, on account of which the action for damages was brought; and in a certain sense legalize the defendant's wrong."

8 A & E Enc. Law, 2d Ed. 685-686.

"We agree with the Tennessee court that the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, or allow a license to continue the wrong when the cause of the injury is of such a nature as to be abateable either by the expenditure of labor or money; and that where the cause of the injury is one not presumed to continue, that the damages recoverable from the wrongdoer are only such as have occurred before the action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance."

*Sutherland on Damages,* par. 1046.

This author cites in support of the doctrine announced in his text as first hereinabove quoted:

*Baltimore vs. Church,* 137 U. S. 568.

And the author of the text in A & E Enc. Law 2d Ed., supra, cites:

*Wilcox vs. Plummer,* 4 Peters, U. S. 172.

*Fort vs. R. R.* 2 Dillion U. S. 259.

See also *Uline vs. Ry.* 101 N. Y. 98.

*Hambleton vs. Vere,* 2 Saunders, 170.

*Roswell vs. Pryor,* 2 Polk 459.

*Bowyer vs. Cook,* 4 C. B. 236.

21 *Enc. Pl. & Pr.* 21-22, citing.

*Milwaukee Ry. Co. vs. Ry Co.* 6 Wall. 742.

Here was not only an amendment unauthorized by law, but a violation of every principle of the law of waiver, by forcing the alleged original waiver, to be applied to the application to amend made 6 years afterward; and as well, a clear abuse of discretion, in allowing it (if there were any power to allow it) without any showing whatever to excuse that long delay or any showing at all; and even after plaintiff, had, against our objections, produced all its proofs of value, and we ours under its assertion that its pleadings were aufficient and satisfactory to it.

ASSIGNMENT XXV.

Not only did we thus suffer in damages by that amendment to the extent of $130,000.00 but the court went further and told the jury by its charge 17, that as to all ore dug after the commencement of this suit, we were charged with knowledge and notice of the plaintiff's title and therefore could not be an innocent or other than a wilful trespasser. And thereby denied us the credits of the reasonable cost of handling and treating,

which, by its charges 18 and 11 it limited to an innocent trespasser. This affected all the ore between the planes, and all, except that in block 10. as to which, alone, could the jury, under the court's charge, consider us an innocent trespasser. This position of the court was accentuated by its refusal of our offered instruction No. XLIV.

Had there been separate suits for the new digging after the beginning of this suit, the jury could have found us innocent as to all in the second suit, unless the court had therein told them that the beginning of the single suit would make us a wilful trespasser as to all digging done thereafter. Herein the court's action prejudiced us as to this supplemental recovery; and forced our alleged waiver of six years before to operate actively against us now, under new and unanticipated conditions. The court misapprehended the principle distinguishing an innocent from a wilful trespasser. A mere claim, whether oral, or in writing, or by a complaint in a suit filed,—the latter being nothing more or less than a formal claim in court,—could not operate to change us from an innocent to a wilful trespasser, for the claim might prove unfounded, or the suit in which the complaint was filed might be finally won by the defendant. The single test is the honesty of our belief of ownership. It goes without saying that that belief might be as honest after as before suit brought, and not until the matter had become res adjudicata by a judgment of a court of last resort, determining the question against us, could the principle be applied that the court told the jury governed from the

time of the beginning of this suit. For the distinction between a final judgment for the mere purpose of appeal and one final in the sense of finally disposing of the rights of the parties, see:

*Russia Cement Co. vs. LePage Co.*, 55 N. E. 70-73.

*In re Brightman*, 14 Blatch. 130.

That good faith and honesty of claim and motive may exist, though an adverse claim be in suit, is beyond debate, both on reason and authority.

> "The quality of the good faith which warrants its application is satisfied if the wrong was done without culpable negligence or wilful disregard of the rights of others, in the honest and reasonable belief that the act was rightful. Notice of the existence of an adverse claim is an important element to be considered, but such notice alone will not necessarily place the wrongdoer in the position of a culpably wilful trespasser and subject him to the more onerous measure of liability."

*Sutherland on Damages*, par. 1020, p. 2246-2248.

> "The court below permitted the appellee to give evidence as to the intention and motives of appellant's superintendent in mining and taking the coal. This action was assigned as a cause for a new trial. * * * * * Here one paragraph of the complaint does charge a wilful trespass and the intention and motives of appellant's superintendent at the time of taking the coal were material as bearing upon the measure of damages."

*Sunnyside Coal Co. vs. Reitz*, 39 N. E. 543.

"The court should have instructed the jury as to the different phases of the rule for the admeasurement of damages, that are dependent as above shown upon the presence or absence of wilful intent in the conversion."

*Wright vs. Skinner,* 16 So. 333.

"On the other hand the weight of authority in this country, as well as in England, favors the doctrine that where the trespass is the result of inadvertence or mistake *and the wrong was not intentional, the value of the property when first taken must govern.*"

*Woodenware cases,* 106 U. S. 432.

"But the facts of the case prevent the conclusion that he could *have honestly believed* that he was entitled to cut timber for sale on either quarter." quarter."

*U. S. vs. Williams,* 18 Fed. 478-480.

It is clear that on the issue of wilful or innocent trespass the intent and motive of the party taking is the subject of inquiry. It is plain that where, as here, each party had asserted its respective claim by suits, the suit of neither could operate as matter of law on the mind, motive or intent of the other. In a case of wilful trespass the higher measure of damage invariably operates to award more than compensation, because more than could possibly have been realized by any one from the ore; and to the extent of the excess it is a punishment for the intentional taking of property known to belong to

another. It is absurd to say that when A honestly believed in his rights against B's claim, of which he well knew, that because B places that claim in court, *eo instanto* A's mind necessarily undergoes a change and thence-forward his honest belief is that B and not himself owns the ore—and this though he may have himself already sued B for some of the same ore taken by the latter. *Non constat* but A may finally win and thereby judicially and conclusively demonstrate the absolute good faith of his continuous claim.

## ASSIGNMENT XLIV.

The court in its charges 11 and 18 practically told the jury that a wilful trespasser could have no credit either for extraction, or for cost of treatment, or handling; and declined to advance the correct rule, by refusing our offered instruction XLIII. Thus as to all ore dug, save as to block 10, he forced the jury, not only to regard us as wilful trespassers but to apply an erroneously higher measure of damages, i. e. the assay value, without credit of any kind.

Even in the case of a wilful trespasser, where as here, the action is, in form, trespass to realty, the only penalty imposed is the loss of what was expended during the trespass. As the trespass is complete when the ore is broken from the ledge, or severed from the realty, the measure of damages is necessarily its value at the moment of severance from the soil. As the mineral contents are the entire value of the rock, and at the moment of

severance they are worth what they will yield in money on reduction, that value, less the expense of reduction, i. e. handling and treatment from the point of severance, is the true measure as to a wilful trespasser, who loses what he has expended in gaining access to the ore and severing it from the soil. This rule not only accepted by authority generally, but, we insist, recognized by the Supreme Court of the United States.

It is clearly announced in *Maye vs. Tappan,* 23 Cal. 306, a case quoted approvingly in 3 *Sutherland on Damages,* Section 1020. And the author, after quoting the above case, cites the Supreme Court of the United States in the Benson case as following the principles there announced. In the Benson case the court found the trespass to be wilful, but allowed as a credit on the value of mineral contents in the rock, the cost of removing the ores from the mines and treating them. We quote from its opinion as follows:

> "The trial court found the value of the ores at the time of their conversion by the defendant was $11,716.65; *that after the ores had been mined and become chattels* there had been expended by the defendant and others, in removing the ores from the mine, in assorting the same from the worthless rock, and in transferring the same to the smelter, the sum of $7,985.83, and gave judgment for the difference, to-wit: $3,730.82 and interest. * * * * * * The contention of the appellant is that there was error in not crediting it also with the cost of mining the ores, but as it received and converted them with knowledge that they belonged to the plaintiff, the ruling of the trial court was, within the decision in

*Woodenware Co., vs. U. S.* 106 U. S. 432, as liberal to the appellant as it had a right to expect."

*Benson vs. Alta Mng. Co.* 145 U. S. 428-434, 36 Co. Op. 762-765.

"We are also of the opinion that the District Court applied the correct measure of damages. The defendants being willful trespassers, it was proper to allow the full value of the coal mined without deduction for their labor and expense in mining the same, the rule of damages being the value of the ore at the time and place it was severed from the realty. * * * * In this case the value of the coal at the collar of the shaft is stipulated to have been $2.05 per ton. By deducting from this amount the cost of transporting the coal from the point in the mine where broken to the collar of the shaft, viz 12 cents per ton, left the actual damage $1.93 per ton, as found by the District Court."

*U. S. Coal Co. vs. Coal Co.,* 24 Colo. 123, 48 Pac. 1047.

"It is also urged that the jury was misdirected as to the measure of damages in that they were told to find the value of the stone after it was broken in the quarry and ready for removal. Defendant contends that it is liable only for the value of the stone as it lay in the land and as a part of the realty. The plaintiff asked only for the value of the stone taken after the land was surveyed and the true boundary ascertained, and it is very clear that as to such stone the trespass was wilful. * * * * * In the case at bar, the jury was advised to find only the value of the stone after it was detached from the land and had become personalty, *and that is within the rule as laid down in all courts."*

*Cheeney vs. Nebraska Stone Co.* 41 Fed. 741.

In the next case, jumpers by invalid location were allowed credit not only for reduction, but for the *extraction* cost of ores, the court saying:

> "The right to locate or re-locate a mining claim depends upon the right to enter upon the land where the mine is situated at the time the location is made. * * * * The testimony of the defendants shows that while in the possession of this mine they extracted and removed therefrom 553 tons of ore, which they converted to their own use. The same testimony shows the net value of this ore to have been about $2.50 per ton in the mine allowing for extraction and reduction. * * * * * It is in evidence, undisputed, that the plaintiff, by its well known agents, remonstrated with defendants and denied their right to locate the mine, or work upon the same, or remove ore therefrom and constantly asserted plaintiff's rights. And finally plaintiff was compelled to bring this action to dispossess defendants. We have, however, adopted the measure above indicated, allowing the defendants the cost of extraction and reduction. Non constant, however, but that plaintiff could have extracted and reduced this ore at less expense than it was done by defendants."

*Aurora Mng. Co. vs. '85 Mng. Co.* 34 Fed. 515-521.

## ASSIGNMENT XXVII.

Herein the court charged the jury that upon the issue of good faith in ore extraction, the defendant must prove it by the same measure of proof that would be required of it had it invaded the surface boundaries of the St. Louis claim. This was clearly error for the fact that it was

digging and extracting beneath its own surface was a potential fact to be considered upon the issue of good faith; and a fact which never could be considered if it were beneath the surface of the St. Louis, while the charge of the court denied not only the benefit of the inferences resulting from the work being done within its own surface, but put upon it the adverse inference that would have arisen had it been down beneath the surface of the St. Louis. So to, it ignores and directs the jury in effect to disregard, all the peculiar facts bearing on the title to the Compromise strip and the precedent litigation with reference thereto, in evidence in that case, when considering the issue of honest belief of ownership.

## ASSIGNMENT XXXI.

Here the Court charged the jury in effect that they should give no credit for ores held by the defendant under injunction process secured by the plaintiff itself, because it told them that the defendant must have offered or left the ores in the possession of the plaintiff and proven their value, and this in the face of the fact that the injunction order expressly required the defendant to keep the ores and not to give them to anyone; and in the face of the further fact that the offer of the ores or delivery thereof by defendant to plaintiff would have been an abandonment of defendant's claim of right and title, which formed the basis of its defence in the injunction suit. Clearly the defendant was entitled to this credit upon the proof of the value of the ores alone, otherwise, it recovers in this suit

as for a conversion, when the injunction suit had operated to prevent a conversion, and it would recover again in the injunction suit. The court, in its charge, believed that it was following your Honors' views, but clearly your Honors denied the credit because in the record then before you there was neither proof of tender nor of value; either would have satisfied your requirements: the court here required both, and therein committed error, making its position the more plain in this regard by refusing our offered instruction L which clearly and correctly stated the law.

## ASSIGNMENTS XXIII, XXIV AND XLIV.

Charging the jury, as the court did in its charges numbers 5, 8 and 11, that the defendant must prove certain specified features "to their satisfaction", is fatal error, unless in some manner cured.

*Brady vs. Mangle,* 109 Ill. App. 172.
*Amer. Dig.,* 1904-B, p. 486, Par. 20-E.
*Thompson on Trials,* Par. 2318, note 6.

This erroneous measure of proof was made the rule of guidance to the jury unaccompanied by the limitation "from the evidence" or "by a preponderance of the evidence"; nor was the phrase "burden of proof" in any manner implied in two of them. And as to the specific fact inquiry, covered by the charge, there was nowhere any correct rule of guidance laid down. While it is claimed that charges 14 and 25 cured the error, it will be

noted that they were generally dealing with the measure required, to satisfy the "burden of proof." As to two of these charges there is not even a suggestion to the jury that the fact inquiry alluded to was one of the instances where the rule, elsewhere given as to "burden of proof," should be applied. A comparison of the facts in the Brady case, supra.—where in the very same single charge the rule was both correctly and uncorrectly given, and where in more than half the charges of the court the rule was correctly stated,—with the charge in this case will show how impossible it is to here assume that this error was in any manner cured. The jury would have undoubtedly applied the specific rule given them by the court in their inquiry as to the specific issue affected by the charge.

## ASSIGNMENTS XXIII, XXIV, XXVIII, XLIII, XLV, XLVI and XLVIII.

The court through the medium of alleged presumptions erroneously put the burden of proof upon us as to nearly every issue and refused all our offered instructions correctly stating the rule. In its charge number 14 it advised the jury that a presumption arose that the trespass was wilful if the ore was dug from a vein apexing in plaintiff's claim. In 15 it vaguely told the jury that the law would supply deficiencies of proof by making every reasonable intendment, etc., without in any manner applying or defining the latter phrase, itself having no fixed legal meaning. And it did the same thing in even a more

direct and injurious manner in charge 20. In charge 16 it allowed them to fix the value by resorting to any other ores,—however dissimilar in kind—in the "vicinity" without defining the latter phrase, or limiting it to ores similar in class. In charge 5 it shifted the whole burden of proof as to the discovery vein and by charge 8 created a presumption as to continuity of that vein, putting the burden on us to overcome it; and by charge 9 it conferred extra-latreal rights, though the discovery vein did not cut either end line but might have passed out the side lines, if any co-called "connecting veins" ran lengthwise between the side lines from the 520 to the 108 foot plane,—though themselves not reaching either end line.—We confidently assert that as owners of the surface, we are prima facie owners of every ounce of mineral rock beneath; that the burden is on the plaintiff as to every material issue throughout the whole case. That, though it might—by making a prima facie case on issue where there was no presumtion in our favor, as there is in the case of the general presumption of ownership of the rock beneath our surface—satisfy this burden, were no opposite evidence submitted, that the mere satisfaction of the burden does not shift the burden at all, but upon the whole evidence it remains as it originally was.

*Montana Co. vs. St. Louis Co.,* 194 U. S. 238-239 48 Co. Op. 995.

*Parrott Co. vs. Heinze,* 25 Mont. 139, 53 L. R. A. 491, 64 Pac. 326.

(The latter case, quoted by the United States Supreme Court in the former case.)

*Doe vs. Waterloo, etc.,* 54 Fed. 935.
*Consolidated Co. vs. Champion,* 63. Fed. 540.
*Catherine Co. vs. Ajax Co.,* 182 U. S. 508.

We respectfully invite your Honors' consideration of every error assigned, though not specially argued herein, believing that many of them will help to explain the reason why the jury so enormously increased the original award in the first trial.

IN CONCLUSION, WE SUMMARIZE:

1. The failure to allege the course or direction of the discovery vein was fatal to plaintiff's case.

2. By disclaiming the Compromise strip and the mineral within it in this complaint, the plaintiff barred himself of recovery for any such mineral.

3. Because the Drum Lummon vein enters and departs from the same sigle side line, it could have no extralateral rights.

4. The decree of injunction in the specific performance case, forbidding any claim of possession or right of possession in not only the ground but as well all mineral therein, and the involuntary conveyance under its mandate, are an absolute bar to this action of trespass, both because they conclusively determine title in us and be-

cause an action of trespass must depend upon possession or right of possession.

5. The refusal of the court to hear evidence as to the situation of the property and the parties to the bond at the time of its execution, to interpret its language and the language of the decree, was fatal error.

6. Suffering the amendment from $50,000.00 to $400,000.00 supplemental damage, at the end of the trial, was grievous error.

7. The court erred in conclusively finding us wilful trespassers as to the ore dug after the beginning of this suit.

8. It erred in the measure of damage prescribed for a wilful trespass.

9. It erred in denying us credit for the injunction ores because not delivered to the plaintiff.

10. It erred in testing our good faith as to ores dug before the suit begun as if we were beneath the St. Louis surface.

11. It erred in its entire theory as to presumtion and burden of proof and in requiring us to prove certain facts specially to the satisfaction of the jury.

12. Generally the errors assigned are substantially so prejudicial as that by the latitude allowed to the jury they account for the enormous verdict.

We insist that to suffer this judgment to stand would be a grievous violation of law, justice and right.

Respectfully submitted,

CHARLES J. HUGHES Jr.,

WILLIAM WALLACE Jr.,

W. E. CULLEN,

W. E. CULLEN Jr.,

*Attorneys for Plaintiff in Error.*

Helena, September 25th, 1905.

# UNITED STATES
# CIRCUIT COURT OF APPEALS
FOR THE
NINTH CRICUIT

MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.



ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

## BRIEF OF DEFENDANT IN ERROR.

BACH & WIGHT,
JOHN B. CLAYBERG,
ARTHUR BROWN, and
M. S. GUNN,
Attorneys for Defendant in Error.

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### BRIEF OF DEFENDANT IN ERROR.

At the former trial of this case the St. Louis Company obtained a verdict and judgment for the value of the ore extracted from the Drum Lummon vein by the plaintiff in error north of the 168-foot plane. The Montana Company being dissatisfied with the judgment brought the case by writ of error to this court. A reference to the opinion of this court (102 Fed. Rep. 430) will disclose that the title of the St. Louis Company to the ore for which a recovery was had at the first trial was disputed solely upon the ground that by the conveyance of the compromise strip all mineral beneath the surface thereof was conveyed, although the same was in fact contained in that part of the Drum Lummon vein or lode which has its apex wholly within the boundaries of the St. Louis claim. This court in its opinion say:

"The principal contention in the case concerns the construction to be given to a conveyance which was executed by the owners of the St. Louis claim to the owners of the Nine Hour claim."

The court further said:

"It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights,—rights that had not been in litigation, and and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, 'together with dips, spurs, angles, and also all the metals, ores, etc., therein.'"

The judgment of the lower court was affirmed.

At the first trial the lower court held that the St. Louis Company could not recover for ore extracted from that section of the Drum Lummon vein, the apex of which was divided by the west boundary line of the compromise ground. This holding precluded a recovery for any ore taken south of the 108-foot plane. The St. Louis Company prosecuted a cross writ of error to this court. This court in its opinion on such writ of error (104 Fed. Rep. 664) said:

"The assignments of error raise but one question

which need now be passed upon, all others having been adjudicated, upon the writ of error of the defendant in error herein, in the case of Montana Min. Co. v. St. Louis Min. & Mill. Co. (C. C. A), 102 Fed. Rep. 430. The question for present consideration is: When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong?"

After a discussion of the question this court further said:

"Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing within the senior location until it has wholly passed beyond its side line. It follows that the court below erred in its refusal to admit the evidence offered as to the value of the ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated."

When the two opinions of this court are considered it clearly appears that the title to the Drum Lummon vein, to the extent that any part of the apex is within the St. Louis claim, was adjudicated and determined to be in the

St. Louis Company. The Montana Company claimed title to all of the ore by virtue of the conveyance of the compromise ground. It further denied the extralateral right of the St. Louis Company south of the 108-foot plane, because a part of the apex of the Drum Lummon vein south of such plane is within the compromise ground. Both of these contentions were decided adversely to the Montana Company.

It is now contended in behalf of the Montana Company that this court should decide the case irrespective of its former opinions and the same as though the case were here for the first time. The assignments of error present every question considered by this court in its former opinions in the case.

The law with reference to the controlling effect of a former decision by an appellate court in the same case is so well established and has been so often recognized and applied by this court that it seems needless to cite authorities. In the opinion in the case of Roberts v. Cooper, 20 Howard 481, it is said:

> "It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but

there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

In the case of Leese v. Clark, 20 Cal. 387-417, Mr. Justice Field states the reasons underlying the doctrine announced in the quotation just made, as follows:

"The supreme court has no appellate jurisdiction over its own judgments; it can not review or modify them after the case has once passed, by the issuance of the remittatur, from its control. It construes, for example, a writen contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration; whether right or wrong, it has become the law of the case. This will not be controverted. So, on the other hand, if upon the construction of the contract supposed, this court reverses the judgment of the court below, and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial; it is just as final to that extent as a decision directing a particular judgment to be enterd is as to th character of such judgment. The court can not recall the case and reverse its decision after the remittatur is issued. It has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone. And if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below."

In the case of Bissell, etc. Co. v. Goshen, etc. Co., decided

by the circuit court of appeals for the sixth circuit, 72 Fed. Rep. 545, Circuit Judge Lurton said:

> "It seems to us that the opinions and decrees of this, as a court of appellate jurisdiction, are final and conclusive upon every point actually decided, and that it is the clear duty of the lower court to give effect to the decree without modification or enlargement, in the very terms of the decree here rendered. They must be either conclusive or merely advisory; they can not be both, or partly one and partly the other. The function of a court is to consider and decide, not to advise. There must be a general rule; and a reasonable rule, predicated upon the very objects and purposes of appellate jurisdiction, is that whatever is actually decided by such a court is finally settled, and is no longer open to review, reconsideration, or re-examination for any purpose other than its due execution. Neither would such a decree be open for reconsideration upon a second appeal to this court. If the decree of the lower court is in accordance with the decree and mandate of this court, there is nothing to appeal from. To appeal from such a decree would, in effect, be an appeal from our own decree. No appeal lies from this court to this court."

This court in the case of Republican Min. Co. v. Tyler Min. Co., 79 Fed. Rep. 733, said:

> "The contention of the plaintiff in error is that the defendant in error has no extralateral right to follow the lode or vein in the Tyler mining claim in its downward course beyond the southerly side line of the Tyler claim, for the reason that, as shown in the diagram, the lode or vein passes through the

side line of the Tyler location. It is further contended that any rights which the defendant in error may have by virtue of its ownership of the Tyler claim must date from the establishment of 'the intermediate end line first made on the ground after the commencement of this action.'

"Both of these questions have been decided by this court adversely to the contention of plaintiff in error. It is well settled by numerous decisions of the supreme court that where a case has been brought before an appellate court, and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; that the appellate court is not bound to consider any of the questions which were before the court on the first writ of error."

The case just cited is a direct authority to the effect that the right of the St. Louis Company to follow the Drum Lummon vein beyond its side line is not now open to inquiry.

In the case of Mathews v. Columbia Nat'l Bank, 100 Fed. Rep. 393, this court said:

> "In the appellate courts of the United States, and in nearly all, if not all, the appellate courts of the states, a second writ of error or a second appeal in the same case only brings up for review the proceedings of the trial court subsequently to the mandate, and does not authorize a reconsideration of any question, either of law or of fact, that was considered and determined on the first appeal or writ of error."

In the case of Mutual Reserve Fund Life Association v. Beatty, 93 Fed. Rep. 747, this court said:

"It is clear that the decision of the circuit court of appeals upon the former writ of error is the law of the case, and, so far as the court has considered the questions at issue, they must be deemed to be *res judicata* and not open for review at this time. The law upon this subject has been established by numerous decisions."

See also the following cases decided by this court:

Sweeney v. Hanley, 126 Fed. Rep. 98.

Oregon R. & N. Co. v. Balfour, 90 Fed. Rep. 295.

Mutual Life Ins. Co. v. Hill, 118 Fed. Rep. 708.

Empire State-Idaho Min. Co. v. Hanley, 136 Fed. Rep. 99.

To the same effect see:

Thompson v. Maxwell, etc. Co., 168 U. S. 451.

Re Sanford Fork & Tool Co., 160 U. S. 247.

Chaffin v. Taylor, 116 U. S. 567.

Board of Supervisors v. Kennicott, 94 U. S. 498.

Stewart v. Salamon, 97 U. S. 361.

Magwire v. Tyler, 84 U. S. 253.

Balch v. Haas, 73 Fed. Rep. 974.

Board of Commissioners v. Geer, 108 Fed. Rep. 478.

Montgomery County v. Cochran, 126 Fed. Rep. 456.

Guarantee Co. v. Phenix Ins. Co., 124 Fed. 170.

Morgan v. Johnson, 106 Fed. Rep. 452.

Texas & P. Ry Co. v. Wilder, 101 Fed. Rep. 198.

Bissell etc. Co. v. Goshen etc. Co., 72 Fed. Rep. 545, p. 552.

Stoll v. Loving, 120 Fed. Rep. 805.

It necessarily follows as a corollary to the proposition of law announced in the authorities above cited, that the

lower court was not at liberty to consider, during the second trial of the case, any issue which was not affected by the errors causing the reversal.

It is claimed in behalf of the plaintiff in error that the case stands unaffected by the former decision of any question involved, because of the form of the judgment rendered and entered on the 8th day of October, 1902, and the language of the mandate to the lower court. In the first place we submit that the form of the judgment and the language of the mandate do not evidence any intention on the part of this court to absolutely nullify its decision, and in the second place, that the law determines the effect to be given to the former decision without regard to the form of the judgment or the language of the mandate.

The judgment reverses the case and directs that a new trial be had. The mandate commands:

> "That such new trial and further proceedings be had in said cause, in accordance with the judgment of this court, * * * and as according to right and justice and the law of the United States ought to be had," etc.

This court, by its judgment, had decided every issue involved in the case except the issue of damages. It is true that this does not appear from the judgment itself, but it was not necessary that it should. The opinions contain the conclusions upon which the judgment is based, and are just as much a part of the judment as though incorporated therein. When a judgment is pleaded as an estoppel or in bar of another action, it is permissible to look to the entire record, and the courts will even resort to parol proof to determine what was decided.

Black on Judgments, Vol. 2, 2nd Ed. Sec. 624.

In the case of Empire State-Idaho Mining Co. v. Hanley,

136 Fed. Rep. 99, this court said:

> "It thus appears that it is settled by the adjudication of this court that the exclusion of the appellee from the mine continued at least until May 6, 1901. *The fact that the views of the court so expressed in the opinion are not contained in the mandate which issued to the lower court renders them no less conclusive as the law of the case.*" (The italics are ours.)

The lower court construed the mandate in the light of the opinions of this court and limited the scope of the issues on the new trial to the questions which had not been decided. This was clearly correct.

In the opinion in the case of Board of Supervisors v. Kennicott, 94 U. S. 498, it is said:

> "It is true that, after reversing the decree of the circuit court upon the former appeal, it was further ordered that the cause be remanded 'with directions to award a new trial;' but the mandate as sent down 'commanded that such execution and further proceedings be had in conformity to the opinion and decree of this court, as according to right, etc., ought to be had.' Technically, there can be no 'new trial' in a suit in equity; and as our mandates are to be interpreted according to the subject-matter of the proceedings here, and, if possible, so as not to cause injustice (Story v. Livingston, 13 Pet. 359), it is proper to inquire what must have been intended by the use of that term in the decree, since it can not have its ordinary meaning. For that purpose we held in West v. Brashear, 14 Pet. 51, that resort might be had to the opinion delivered at the time of the decree. Availing ourselves of this rule, it is

> easy to see that there could have been no intention to open the case for further hearing upon the issues presented and decided here. There is not an expression of any kind in the opinion indicating any such determination. On the contrary, it is distinctly declared that the mortgage was valid, and that the complainants were entitled to their judgment. Under these circumstances, it is apparent that the words 'new trial' were used to convey the idea of such further action as should be found necessary to carry into effect what had been already decided. No error has been assigned upon the proceedings in the circuit court under the mandate construed in this way, and the decree of the circuit court is, therefore, affirmed."

In the opinion in the case of Thompson v. Maxwell etc. Co., 168 U. S. 451, the court said:

> "It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error can not be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. * * * We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for future disposition of the case.
>
> "We therefore turn to the former opinion and mandate to see what was presented and decided."

In the case of Re Sanford Fork & Tool Co., 160 U. S. 247, the court said:

"The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and even upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly."

In the case of Gaines v. Caldwell, 148 U. S. 228, the court said:

"It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the circuit court; that the circuit court had a right, therefore, to proceed in the case, in the language of the mandate, not merely 'in conformity with the opinion and decree of this court,' but also 'according to right and justice;' and that, therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, 'by way of defense to the title to the lands in controversy,' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;' in other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This can not be allowed, and is not in accordance with the opinion and mandate of this court. * * *

"What it remained for the circuit court to do was only the taking of the account in the manner indicated by this court. This court, in its opinion, overruled all of the objections taken to the title, and to say that its decree virtually reversed the whole decree of the circuit court is to say that it has done that which it said in its opinion ought not to be

done. Under its opinion, it intended to reverse only a part of the decree, and that is all it did. It substantially affirmed that part of the decree below which related to the title, and virtually only modified the entire decree, and that only in respect to taking the account.

"In construing the mandate or in determining the action to be taken thereon, in case of a general order or incomplete directions, the lower court should look to the reasons stated in the opinion of the appellate court, and be governed thereby in the action taken." (Cyc. L. & P., Vol. 3, p. 491.)

This court first affirmed the judgment of the lower court, and then on the writ of error prosecuted by the St. Louis Company, remanded the cause for a new trial "as to damages alleged and recovery sought for conversion of ore" between the 108 and 133-foot planes. As there could be but a single judgment in the case the effect of the last decision was to reverse the entire judgment of the lower court, and this court entered a judgment accordingly. When this judgment is considered in connection with the opinions, as it should be, it is apparent that there was no intention to nullify the decision made. What had been decided became the law of the case, and the lower court was clearly right in eliminating from its consideration, and the consideration of the jury, the issues which had already been finally determined by this court.

In the case of Kinsman v. Page, 24 Vt. 656, it is said:

"The reversal of a judgment of the county court, only opens such issues as were affected by the errors, for which the judgment is reversed."

See also:

Strother v. Aberdeen & A. R. Co., 31 S. E. Rep. 386.

Hardin v. Shedd, 52 N. E. Rep. 380.

Broughel v. Southern etc. Co., 45 Atl. Rep. 435.

Southern Ry Co. v. O'Bryan, 4 S. E. Rep. 1000.

Chandler v. Peoples' Savings Bank, 73 Cal. 317.

Kent v. Whitney, 9 Allen 62.

In the opinion in the last case cited the court said:

> "Although the evidence offered by the defendant was erroneously rejected, we are of opinion that he is not entitled to a new trial of the whole case. The evidence which the court refused to admit had no bearing whatever on the title to the property in question, or its conversion by the defendant. These questions had been settled by the verdict of the jury, under rulings to which no exception has been taken, and they ought not to be again reopened."

In the brief of the plaintiff in error it is said that the doctrine of the "law of the case" has been carried so far in some instances that an appellate court has refused to review a former decision in the same case, even though it was erroneous. It is further said that "This ridiculous position, however, is being rapidly overturned." In every instance where it is sought to have an appellate court review its former dicision in the same case it is, of course, contended that the former decision was erroneous. If the appellate court is required to consider the question of the correctness of its former decision, and, if found erroneous, to decide to the contrary, then every case would be decided without regard to the former decision, and there would be no end to litigation. Unless we are to ignore the numerous decisions of the supreme court of the United

States and of this court and other federal courts, we must take issue with the statement that the doctrine of the law of the case is "ridiculous" and "is being rapidly overturned." An appellate court can not, in its discretion, review or refuse to review its former decision in the same case, but it is absolutely precluded by established principles of law from considering what it has already decided.

In the case of Magwire v. Tyler, 17 Wall 253, it is said:

> "Appellate power is exercised over the proceedings of subordinate courts, and not over the judgments and decrees of the appellate court, and the express decision of this court in several cases is that 'the court has no power to review its decisions, whether in a case at law or in equity, and that a final decree in equity is as conclusive as a judgment at law,' which is all that need be said upon the subject."

In the opinion in the case of Clark v. Keith, 106 U. S. 464, it is said:

> "That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error can not be re-examined on a subsequent writ brought in the same suit."

In the case of Roberts v. Cooper, 20 Howard 467, it is said:

> "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. * * * We can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial."

In the case of Illinois ex rel Hunt v. Illinois C. R. Co., 184 U. S. 77, it is said:

> "Every matter embraced by the original decree of the circuit court, and not left open by the decree of this court, was conclusively determined, as between the parties, by our former decree, and is not subject to re-examination on this appeal."

In the case of Stewart v. Salamon, 97 U. S. 361, Mr. Chief Justice Waite observed:

> "An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is, in effect, our decree, and the appeal will be from ourselves to ourselves."

This court said in the case of Mathews v. Columbia National Bank, 100 Fed. Rep. 393:

> "In the appellate courts of the United States, and in nearly all, if not all, the appellate courts of the states, a second writ of error or a second appeal in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question, either of law or of fact, that was considered and determined on the first appeal or writ of error."

In the case of Balch v. Haas, 73 Fed. Rep. 974, Circuit Judge Thayer said:

> "Another form of stating the doctrine is that propositions of law which were considered and decided on the first appeal become the law of that particular case, and, whether right or wrong, must be adhered to on a second appeal."

In concluding this branch of the case we respectfully submit that the only issue open for consideration in the lower court on the second trial was the issue of damages. On the first trial, by the verdict of the jury and the judgment of the court, it was determined that the St. Louis Company has title to that part of the Drum Lummon vein, the whole of the apex of which is within the St. Louis claim. This court affirmed the judgment of the lower court as to the title to that section of the Drum Lummon vein north of the 108-foot plane. The decision of the lower court, to the effect that the St. Louis Company does not own that part of the Drum Lummon vein which has its apex on both sides of the west boundary of the compromise ground, was overruled, and it was expressly held by this court that the St. Louis Company is the owner of the Drum Lummon vein to the extent that any part of the apex of such vein is within the St. Louis claim, with the extralateral right attaching thereto. It follows, that the question of title to the vein and ownership of the ore extracted therefrom has been eliminated from the case.

* * * * *

The first error assigned relates to the sufficiency of the complaint. It is contended in behalf of plaintiff in error that "the complaint does not state facts sufficient to constitute a cause of action." This court is asked to reconsider its former opinion regarding this matter.

This very question was presented and decided on the former hearing before this court. In the opinion the same objections now made to the complaint were considered, and it was held that these objections were without merit, and that the complaint states a cause of action and is sufficient to sustain a judgment. Such holding is the

law of the case, and this court is without jurisdiction to again consider the question.

Northern Pacific v. Ellis, 144 U. S. 458.

Board of Commissioners v. Geer, 108 Fed. Rep. 478.

It is claimed that the complaint should contain allegations with reference to the strike, dip and length of the discovery vein, and that it was error to admit proof as to these matters in the absence of such allegations. In the complaint it is alleged that the plaintiff is the owner, in the possession and entitled to the possession

> "of that certain quartz lode mining claim known as the St. Louis quartz lode mining claim, and of the quartz rock, ore and precious metals contained in any and all veins, lodes and ledges or mineral bearing rock through their entire depth, the tops or apices of which lie within the surface lines of said fractional portion of said St. Louis lode mining claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis quartz lode mining claim."

The complaint also alleges that the ores in controversy were taken from a vein which has its apex within the surface boundaries of the St. Louis claim. These allegations are equivalent to a direct allegation of ownership and possession of that part of the Drum Lummon vein from which the ores were extracted. It is an elementary rule of pleading that it is not necessary to state evidence, but only to plead ultimate facts. The allegation of ownership is an allegation of an ultimate fact and clearly warranted the introduction of any proof essential to establish such fact.

It was not necessary to allege why the St. Louis Company owned this vein, any more than it would be necessary, in an action for trespass upon agricultural land, to allege the source of title. The decision of this court as to the sufficiency of the complaint was clearly correct.

Furthermore, any question regarding the discovery vein was not open for consideration and determination by the lower court on the second trial. This court had finally decided the issue of title, which issue incidentally involved the inquiry as to the strike and dip of the discovery vein and its length through the claim.

Republican Mining Co. v. Tyler Min. Co. 79 Fed. 733.

Sweeney v. Hanley, 126 Fed. Rep. 98.

Gaines v. Caldwell, 148 U. S. 228.

* * * * *

Although any inquiry regarding the discovery vein had become immaterial, proof was introduced from which the jury found, under the instruction of the court, that the discovery vein has such a strike and dip and extends for sufficient length through the claim as to entitle the St. Louis Company to extralateral rights on that part of the Drum Lummon vein, from which the ore in controversy was taken.

The question of the sufficiency of the evidence to sustain the verdict is not before the court, but we quote below some of the evidence relative to the discovery vein, because in the brief of plaintiff in error there are statements made with reference to the discovery vein which are entirely unwarranted.

Witness Mayger testifies regarding the discovery vein as follows:

"It runs very nearly parallel with the side line of

the St. Louis. We have traced the vein to within ninety-five feet of the end line at the south end, and to a distance of about four hundred feet from the north end. It dips to the east at an angle of about eighty degrees from the horizontal. We have sunk on this vein, to a depth of about 425 feet. The St. Louis Company has extracted over $41,000 worth of ore out of the discovery vein in both the north and south tracts, from the transcontinental tunnel. That part of the vein disclosed in the southerly drift of the transcontinental tunnel is developed on the lower levels to within ninety-five feet of the south end line, and it is a good strong vein at that point, extending in the direction of the end line." (Record. pp. 41-42.)

Witness Water Proctor Jenny testifies as follows:

"I have examined the discovery vein of the St. Louis lode mining claim. Its course is substantially north-east and south-west. I believe that the discovery vein extends the full length of the claim from end line to end line. Explorations under ground show that it lies within 750 feet of the north end line, and in the south end it is traced to within 95 feet of the end line. I find an outcrop within 150 feet of the north end line, which I believe to be the outcrop of this discovery vein. The dip of the vein is easterly from seventy-five to eighty degrees." (Record pp. 60-61.)

Witness John R. Parks testified:

"The discovery vein of the St. Louis is a gold appearing fissure vein running in the general direction of the side lines. The vein is developed both northerly and southerly from the transcontinental

tunnel. There are levels running on the vein about 250 feet below the transcontinental tunnel. It has a dip of about eighty degrees to the east. The transcontinental tunnel follows a fissure and there is a fault of the lode caused by that fissure, which causes a throw of the vein of about 95 feet."

* * * *

It is next contended in behalf of the plaintiff in error that the former decision of this court to the effect that the St. Louis Company is the owner of that part of the Drum Lummon vein, the apex of which is on both sides of the west boundary of the compromise ground, is erroneous. A request is made that this court reconsider its opinion and decision in respect to this matter.

During the last trial of the case in the lower court, one of the attorneys for the defendant, Mr. W. E. Cullen, stated that "it was admitted by the defendant that the foot wall of the Drum Lummon vein crossed the west side of the compromise strip approximately at its intersection with the 133 foot plane." (Record p. 107.) There was, therefore, no question of fact in the case regarding the place at which the foot wall of the Drum Lummon vein crossed the west boundary of the compromise ground.

It thus appears that this court is asked to again consider and decide the identical question of law which it has already thoroughly considered and decided. We submit that the former decision is correct and that this court cannot, if it were so inclined, again consider the question. The authorities establish conclusively the proposition that what has been once decided by an appellate court is not open to review on a second appeal or writ of error. The lower court treated the question as foreclosed by the decision of this court. (Record pp. 45-48.)

The opinion and decision of this court on this subject has been regarded as a correct exposition of the law by all courts in which a similar question has arisen.

In the case of Bunker Hill etc. Co. v. Empire etc. Co., 106 Fed. Rep. 471, District Judge Beatty said:

> "The Viola and San Carlos are parallel to each other, are located along the course of the ledge, and each has within its surface a portion of the apex. The Viola, being the older, would, by the weight of authority, take the whole ledge. If this court had any doubts on that proposition, it still would be controlled by the late decision in St. Louis etc. Co. v. Montana etc. Co., 104 Fed. Rep. 664, by the circuit court of appeals of this circuit. The wisdom of the decision is illustrated in this case."

See also opinion of circuit court of appeals in same case, 131 Fed. Rep. 591.

In the brief of plaintiff in error it is said, in speaking of the opinion of this court upon this question:

> "It has been accepted without dissent, by both Mr. Lindley and Mr. Snyder, in their works on mines, and has been cited in a number of cases since decided."

In the brief for plaintiff in error it is stated that the opinion of this court regarding the title and ownership of the Drum Lummon vein south of the 108-foot plane is based upon the proposition "that the St. Louis claim having the eldest location and patent, was entitled to the whole of the vein so long as it had any portion of the apex within its surface boundaries," etc. (Brief p. 62.) It is also said in speaking of the decision of the question: "In so holding, this court entirely overlooked the fact that the compromise strip was patented as a part of the St. Louis

claim," etc. (Brief p. 62.) The statement that the opinion of this court in respect to this matter was based upon the fact that the patent to the St. Louis claim was issued prior to the patent for the Nine Hour claim is wholly unwarranted. A reference to the opinion discloses that this court only considered the seniority of location as between the two claims. In the opinion it is said:

> "That inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the *senior locator*, the entire vein must be considered as apexing upon the *senior location* until it has wholly passed beyond its side line." (We have italicized.)

In the 5th paragraph of the complaint (Record pp. 5-6) it is alleged that the Nine Hour claim included the compromise ground and that the discovery and location of the St. Louis claim was prior to the discovery and location of the Nine Hour claim. The allegations of this paragraph are admitted by the answer. Furthermore, a reference to the judgment roll in what is termed the "specific performance case" will show that it was alleged in the complaint in the case, and the judgment was recovered upon the theory, that the compromise ground was always a part of the Nine Hour claim.

It does not require any argument to establish the proposition that the only material inquiry is regarding the priority of location as between these two mining claims. The right of the parties are controlled by the locations, irrespective of the date when either patent was issued.

Counsel for plaintiff in error call attention to the fact that the area in conflict between the claims was much greater than the area embraced within the compromise ground. It is claimed that the ore in controversy was all

taken from that part of the Drum Lummon vein, the whole of the apex of which was within the Nine Hour claim, as located, and consequently, the question of priority of location is immaterial. There are several reasons why such a position can not be maintained.

1. It is an admitted fact in the case that the compromise ground, which is specifically described in the complaint, was a part of the Nine Hour claim, and there is no allegation in the answer that any greater area than that included in the compromise ground was a part of the Nine Hour claim.

2. Any question as to the boundary line between the two claims was fully and finally disposed of by the settlement and compromise which resulted in the bond for a deed or contract to convey.

3. The judgment in the specific performance case has forever foreclosed any inquiry regarding the original boundaries of the Nine Hour claim. In that case it was determined that the boundary line between the two claims had been established by the compromise and settlement and the contract to convey. In the opinion of the supreme court of the State of Montana in the case (20 Mont. 405) it is said: "What did the parties do? In order to settle a costly and troublesome lawsuit they entered into a compromise, by which they settled the title among themselves to the ground in dispute and fixed the boundary line between their two claims." The parties to that action were the same as the parties to the case now before the court.

4. This court has already decided that the St. Louis Company is the owner of the Drum Lummon vein to the extent that any part of the apex is within the surface

boundaries of its claim, and this decision is the law of the case.

We shall not attempt to further discuss the matter, but respectfully refer the court to the briefs filed in this court on behalf of the St. Louis Company, and considered on the former hearing.

* * * *

Assignments of error V, VI and VII are spoken of in the brief of plaintiff in error as of "minor importance." Authorities are cited, however, to sustain the contention that the admission of the map referred to in assignment of error VI was error.

The map was not offered as evidence, and neither was it claimed that the same was correct. The sole purpose for which it was used was to illustrate the testimony, and the court admitted it for this purpose and for no other. (Record p. 59.) That no error was committed, see

Jordan v. Duke, 53 Pac. Rep. 197.

People v. Figueroa, 66 Pac. Rep. 203.

Hall v. Conn. Mut. Life Ins. Co., 79 N. W. Rep. 497.

For a discussion of the question of the admissibility of maps and diagrams, see:

Wigmore on Evidence, Vol. 1, Sections 790-795, and cases cited in notes.

The map is not before this court, but it is apparent from the testimony that it was a surface map. It could not in any manner have related to the quantity and value of the ore extracted, which was the only issue open for consideration. We have already called attention to the fact that it is admitted that the crossing of the west boundary line of the compromise ground by the foot-wall is at the intersection of such line with the 133-foot plane. So far as the

record shows, the map is correct except in the particulars pointed out by the witness Mayger. The statements in the objection to its introduction certainly can not be received as evidence of its incorrectness.

* * * *

The next proposition advanced in behalf of the plaintiff in error is that by the judgment in what is termed the "specific performance case," it was conclusively determined that the plaintiff in that case, the Montana Company, was entitled to a conveyance of that part of the Drum Lummon vein lying beneath the surface area of the compromise ground. In other words, that such judgment establishes the right of the plaintiff in error to the ore in controversy. This contention presents again the question of title, which has already been adjudicated by this court. The record on the former writ of error contained the judgment roll in the "specific performance case," and, so far as the position now taken with reference to the judgment in that case is concerned, the conditions are not in any particular different from what they were when the case was before this court on the former writ of error. The decision of this court renders every question then considered and which might have been considered, *res judicata* between the parties.

In the case of Guaranty Co. v. Phenix Ins. Co., decided by the circuit court of appeals for the Eighth circuit (124 Fed. Rep. 170), Circuit Judge Sanborn in the opinion said:

> "This condition of the record suggests the query whether the questions raised by the rulings of the court during the trial were not rendered *res judicata* by the former judgment of this court upon the writ of error sued out by the plaintiff. *That judgment, like the final decision of every court which has*

> *jurisdiction of the matters and parties it judges, rendered every question which was litigated and every question which might have been raised and determined in this court at the time of the hearing of the former writ of error* res judicata *between the parties to it.*" (We have italicized.)

In the brief of plaintiff in error it is said that in the specific performance case the question of the right to the mineral in the compromise ground was distinctly in issue, —in fact the main issue in the case,—and was "fought out to the court of last resort." An examination of the pleadings and the judgment in the case will disprove these statements. The construction of the contract to convey was not involved in the case and could not have been litigated. The purpose of the action was to secure a conveyance in accordance with the terms and provisions of the contract. The judgment reads, in part, as follows:

> "It is ordered, adjudged and decreed that the agreements set forth in the contract herein, a copy whereof is attached to the complaint as an exhibit, be specifically performed, and that the defendant, the St. Louis Mining and Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to the said plaintiff a good and sufficient conveyance in fee simple absolute, free from all incumbrances, of and for the premises mentioned in the complaint and hereinafter described." (Record, p. 104.)

The description contained in the judgment is in the identical language of the contract.

In view of the pleadings and judgment in the case, it is idle to contend that the question of the construction of the contract to convey was an issue in the case or considered

or decided. The judgment is necessarily limited in its operation by the pleadings, and the pleadings do not warrant any relief beyond a judgment requiring a conveyance in accordance with the contract.

The only question, therefore, is: What was meant and intended in the contract to convey, in the judgment and in the deed, by the expression, "together with all mineral therein contained?" This very question was before this court on the former writ of error and thoroughly considered, and decided. In the light of these circumstances and the law with reference to the controlling effect of a former decision of an appellate court in the same case, it seems entirely useless to again discuss the question.

As a matter of fact, the pleadings, findings of fact and conclusions of law in the specific performance case constitute a complete answer to the claim made that it was the intention of the parties to the contract that the conveyance should embrace the ore in controversy in this action. A full and fair statement of the facts in the case was made by Mr. Chief Justice Fuller when the case was before the supreme court of the United States, to which reference is hereby made. (171 U. S. 650.) It appears from the complaint in the case that the compromise ground was the entire area in conflict between the Nine Hour and the St. Louis claims; that Mayger applied for a patent to the St. Louis claim, and in the survey he caused to be made of his claim he included a part of the Nine Hour lode mining claim; that thereupon an action was commenced to determine the right to the possession of the compromise ground; that afterwards, "to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour lode mining claim and the said St. Louis lode mining

claim," the bond for a deed or contract in question was executed and delivered. The entire complaint was based upon the theory that the compromise ground was, at the time the contract to convey was made and always has been, a part of the Nine Hour claim, and that the purpose of the contract was to establish the boundary line between the two claims the same as it would have been established if the area in conflict had not been included in the application made by Mayger for a patent to the St. Louis claim. The plaintiff in the case did not claim a right to the conveyance by virtue of an assignment of the contract, but based its right to a conveyance upon the fact of its ownership of the Nine Hour claim.

It was because of this position taken by the plaintiff in the specific performance case, and the theory upon which it had succeeded in obtaining a judgment, that the case was taken to the supreme court of the United States by the St. Louis Company. In the opinion of the supreme court of the United States (171 U. S. 650) it is said:

> "The proposition of plaintiffs in error is that where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the government which sustains this proposition."

When the entire record in the specific performance case

is considered it is apparent that, instead of the question of the right and title to the ore in controversy herein being "fought to a finish," as a matter of fact, the case was litigated to a conclusion in the Supreme Court of the United States upon the theory advanced by the plaintiff in the case, that the compromise ground was always a part of the Nine Hour claim, and the purpose of the arrangement resulting in the bond for a deed, was to settle and establish the boundary line between the St. Louis and Nine Hour claims. This theory is wholly inconsistent with the idea that the owners of the Nine Hour claim were to receive more by the conveyance than they would have obtained if a patent had been issued to them for the compromise ground as a part of the Nine Hour claim. The plaintiff in the case took the position that by the conveyance of the Nine Hour claim it had acquired the equitable title and right to the possession of the compromise ground and was entitled to a conveyance of the legal title, which had been acquired by Mayger, as trustee for the owners of the Nine Hour claim. Whether or not the compromise ground had been located as a part of the Nine Hour claim or as a part of the St. Louis claim was distinctly an issue in the case, and the court found that it was always a part of the Nine Hour claim, and that by reason of this fact and the arrangement made whereby title was to be taken by Mayger, with the understanding that the same would be conveyed, the plaintiff was entitled to the conveyance. The action was in fact an action to declare and enforce a trust although termed an action for specific performance.

During the second trial of this case in the court below evidence was offered for the stated purpose of showing the intention of the parties to the contract to convey, in order that the contract might be construed in accordance with

such intention. Error is assigned upon the refusal of the court to receive such evidence. There are several conclusive reasons in support of the action of the lower court with reference to this matter.

1. The Montana Company, plaintiff in error, had, in the action for specific performance, taken the position that the compromise ground was always a part of the Nine Hour claim; that the purpose of the agreement for a settlement and compromise was to establish the boundary line between the two claims, and that, although there had been no assignment of the contract, the conveyance to it of the Nine Hour claim operated as a conveyance of the equitable title to the compromise ground and entitled it to a conveyance of the legal title. In brief, the Montana Company had taken the position that it was entitled to be placed in the same position it would have occupied if the compromise ground had been conveyed by the United States as a part of the Nine Hour claim. The evidence offered was for the purpose of showing an entirely different intention. The purpose of the evidence was to establish that it was the intention of the parties that the ore in controversy in this case, although in a vein which has its apex within the St. Louis claim, was intended to be conveyed, thereby disproving the allegations in the complaint in the specific performance case upon which judgment had been recovered. This was not permissible.

In the case of Davis v. Wakelee, 156 U. S. 680, the court said:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position,

especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Thus in Philadelphia W. & B. R. Co. v. Howard, 54 U. S. 307, where a corporation sought to defend against an instrument by showing that the corporate seal was affixed thereto without authority, and that it was not, sealed or unsealed, intended to be the deed of the corporation, evidence was held to be admissible to show that, in a former suit, the corporation had treated and relied upon the instrument as one bearing the corporate seal. In delivering the opinion, the court observes: 'The plaintiff was endeavoring to prove that the paper declared on bore the corporate seal of the Wilmington & Susquehanna Railroad Co. This being the fact to be proved, evidence that the corporation, through its counsel, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtely admissible. * * * * * The defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil county court, by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and to his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, a fraud in law, if he does not know it to be true. * * * We are clearly of opinion that the defendant can not be heard to say, that what was asserted on a former trial was false, even if the assertion was made by mistake. If it

was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it.' "

It is immaterial whether the position taken in the specific performance case, or the position now taken, is correct. The fact is that the Montana Company recovered a judgment, and it is now estopped from disputing what it then asserted in order to secure such judgment. Let us assume that the position which it took in the specific performance case was because the St. Louis Company had acquired the interests of three of the parties to the contract. If, then, it had claimed under the contract, it could have only acquired an undivided interest in the compromise ground. Now, that its interests have changed, it should not be allowed to treat the conveyance as a conveyance of a part of the St. Louis claim.

2. This court in its opinion (102 Fed. Rep. 433) said:

"It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights,—rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyence would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining

claims, 'together with dips, spurs, angles, and also all the metals, ores, etc., therein.'"

Here we have an express decision by this court that the words, "together with all mineral therein contained," are not sufficient to deprive the St. Louis claim of its extra-lateral rights. If, then, it was the intention to do so, the intention was not expressed, and the remedy which the plaintiff in error should have invoked was an action to reform the contract. This being an action at law, and, furthermore, there being no allegation of any mistake as a basis for a reformation of the contract, the same must be taken according to its language.

In the case of Muldoon v. Deline, 31 N. E. Rep. 1091, the circuit court of appeals of New York said:

> "The defendant upon the trial offered parol evidence of the conversations and negotiations between Burton and the planitiff, and of other circumstances, to show that it was not the intention of the parties to the deed to include therein the land in question, and that the first course in the deed should not run at right angles with Rust street, but diagonally, so as to strike the southerly line of lot 137 forty feet from the southerly line of lot 121. There is no ambiguity in the description contained in the plaintiff's deed. Every line can be surveyed on the ground just as it is given, and the grantor had the land. When the description is applied to the land, no ambiguity is produced, and hence there is no room for parol evidence. It is true that the intent of the parties to the deed must control. But that intent must be ascertained from the language contained in the deed. * * * The defendant, in his answer, did not allege any mistake, and asked

for a reformation of the deed. It is possible that there is a mistake in the descriptions contained in the deeds of both of these parties. If the defendant has any remedy it is by an action to reform the deeds; and to that action probably Burton, the grantor, would be a necessary party, and perhaps also Harrington, the grantee of the lot lying southerly of the plaintiff's. With all the parties before the court in such an action, parol evidence might be given to show mistake, and, if the defendant could clearly establish the mistake, he might procure a reformation of the deeds, unless equitable considerations, after the lapse of so much time and changed conditions, should impel the court to deny the relief. But in this legal action, with these two parties only before the court, the deeds as written must control."

See also:

Resurrection Min. Co. v. Fortune Min. Co., 129 Red. Rep. 668.

3. A final and conclusive reason in support of the action of the lower court in refusing to receive such evidence is that the issue of title had been determined by this court, and no inquiry regarding the same was permissible.

This position is anticipated and sought to be overcome in the brief of counsel for plaintiff in error. It is said that the law declaring the former opinion of an appellate court in the same case conclusive of the questions decided only applies where different or additional evidence is not introduced when a new trial is had in the court below. This statement is both correct and incorrect. When a new trial is had after a decision by an appellate court, the scope of the issues is limited by the decision of the higher court. The lower court is at liberty to, and should, try

again such issues as are affected by the errors committed on the former trial and are left open by the appellate court. It should not and can not try any issue which has been finally disposed of. If, upon the second trial, different or further evidence is introduced respecting an issue which has not been foreclosed, by the decision of the higher court, the higher court will consider the questions presented regarding such issues. In the case at bar the question of title was finally settled and determined by the former decision of this court, and as the lower court was not authorized to try this issue again, the evidence offered was not admissible, and the doctrine that a higher court will not consider itself bound by a former decision in the same case where the record presents a different state of facts than was presented on the first writ of error or appeal, does not apply. Unless the rule is as stated, then every issue in a case is open for trial where the judgment of the lower court is reversed, and there is no such thing as any question being finally determined by a decision of a higher court reversing the judgment of a lower court. In support of the rule, as we undrestand it, see the cases hereinbefore cited as to the effect of a decision of an appellate court, and particularly:

Gaines v. Caldwell, 148 U. S. 228.

Board of Supervisors v. Kennicott, 94 U. S. 498.

Leese v. Clark, 20 Cal. 387-417.

Republican Min. Co. v. Taylor Min. C., 79 Fed. Rep. 733.

Where an appellate court has construed a contract, such construction becomes the law of the case.

United States v. Pacific etc. Co., 104 U. S. 480.

Sharpstein v. Friedlander, 63 Cal. 78.

The lower court in sustaining the objection to the evi-

dence offered said:

> "My belief is that the deed was executed having reference to the acts of congress, and that the words of the deed did not include the minerals in that portion of the vein apexing outside of the compromise strip." (Record, p. 112.)

In what is termed the "specific performance case" the right of the plaintiff was not based upon any contractual relation with Mayger or the St. Louis Company. There is no allegation of any assignment of the interests in the contract of either of the contracting parties. The case proceeded upon the theory that the compromise ground was always a part of the Nine Hour claim; that the grantors of the Montana Company always had the equitable title to this ground, which was conveyed to the Montana Company by the conveyance of the Nine Hour claim; and that Mayger, by his patent, acquired the bare legal title to the ground, which, in equity and good conscience, belonged to the owners of the Nine Hour claim. The allegations of the complaint and the theory of the case characterizes it as an action to declare and enforce a trust. The case stands the same as where A purchases real estate and for some reason directs that the title should be transferred to B to be held in trust for A. In view of these considerations it is apparent that the Montana Company only acquired, by the judgment in the case and the conveyance made pursuant thereto, the legal title to the compromise ground, to which it and its grantors always held the equitable title. The judgment in the case conclusively estops the Montana Company from claiming more than its grantors would have received if the patent to the Nine Hour claim had included the compromise ground.

* * * *

The next assignment of error relates to the amendment of the *ad damnum* clause of the complaint. It appears that on the 26th day of June, 1899, what is termed the "second amended and supplemental complaint" in the action was filed. (Record p. 9.) In this complaint damages are claimed for ore extracted by the plaintiff in error from the time of the filing of the original complaint in the action to the 26th day of June, 1899. The ore so extracted was alleged to be of the value of $50,000.00. At the former trial the complaint stood as it does at the present time with the exception that the allegation as to the value of the ore extracted from the time of the commencement of the action to the filing of the amended and supplemental complaint has been changed from $50,000.00 to $400,000.00. No error is assigned to the action of the court in permitting the amended and supplemental complaint to be filed, and, so far as the record discloses, the same was filed without objection. The right to object has been waived, and this seems to be conceded by counsel for plaintiff in error. In the case of Witowski v. Hern, 86 Cal. 604, the court said:

> "Even if the amendment thus made alleged a new cause of action arising after suit brought, and the amendment was wrongfully allowed, the appellants are not now in a position to object. They answered the third amended complaint. If they had any good ground of objection, they waived it by the course pursued."

It is claimed, however, that although the amended and supplemental complaint may have been filed without objection, the amendment made thereto, which is now complained of, was unauthorized. The motion to amend was made after the taking of the testimony had been con-

cluded. (Record p. 175.) The evidence on the part of the plaintiff showed the value of the ore in the ten blocks to be $276,610,38. (Record pp. 71-74.) The witness Parks testified that the ore body between the two planes and above the 190-foot level, outside of the blocks designated, has a value of $132,290.44. (Record p. 76.) The record does not show that this ore body was not extracted. In the objection to the proposed amendment it is said:

> "There is no testimony in the case showing or tending to show that the damage, if any, exceeds the sum of $276,000.00."

After the filing of the amended and supplemental complaint the right to recover was the same as though the action had been commenced on June 26th, 1899.

In the case of Spurlock v. Missouri Pacific Ry. Co., 16 S. W. Rep. 834, it appeared that the cause of action stated in the original petition had been changed in a third amended petition filed, to which no objection was interposed. Subsequently, by leave of court, a fourth amended petition was filed, to which objection was made. In the opinion in the case the court said:

> "Having gone to trial on the amended petition it is quite too late for the defendant to raise the question that the fourth amended petition had changed the cause of action from what it was in the original petition."

The court may, in its discretion, grant the right to amend the *ad damnum* clause at any time before judgment.

Graves v. N. Y. etc. Ry Co., 160 Mass. 402.

Cain v. Cody, 29 Pac. Rep. 778.

Ellis v. Ridgway, 1 Allen 501.

Chamberlain v. Mensing, 51 Fed. Rep. 511.

M. O. P. Co. v. B. & M. Co., 27 Mont. 288.

Bamberger v. Terry, 103 U. S. 40.
Mack v. Porter, 72 Fed. Rep. 236.
Bowden v. Burnham, 59 Fed. Rep. 752.

In the case of Chamberlain v. Mensing, 51 Fed. Rep. 511, cited above, the court said:

> "The damages are not the cause of action. The cause of action is the wrong done to the plaintiffs. The right to recover damages grows out of this wrong done, because of the wrong."

In the brief for plaintiff in error it is stated that "the proofs left it uncertain as to many of the blocks, how much ore was extracted before and how much after June, 1899." It is also said that by allowing the amendment to be made the court permitted the plaintiff to extend the period for recovery to the date of the amendment.

The witness Burrell, manager of the Montana Company, testified as follows: "I know where the 108 and 133 foot planes are. Such ore as was taken out between these planes was mined between the 1st of November, 1898, and about the middle to the 20th day of April, 1899." (Record p. 139.) "All of the ore which was extracted from the vein south of the Montana Company's apex shaft to the 133-foot plane and above the 190-foot level was taken out by the defendant prior to June 1st, 1899." (Record p. 140.) "The raise was made to the 85-foot level, and the excavation of block 8 was made in November, 1898." (Record p. 161.)

Block 10 is on the 190-foot level, and this level was run during the time that the witness Goodale was consulting engineer for the Montana Company, which was from 1893 to 1898. (Record pp. 136-137.) It was contended in behalf of the plaintiff in error that blocks 4 and 9 do not exist. The witness Goodale testified that blocks 4 and 9

are still in the ground. (Record p. 137.) The record does not show that a pound of ore was extracted after June 1st, 1899, but, on the contrary, it does show conclusively that all of the ore in controversy was extracted prior to that date.

Blocks 2, 3, 4, 5, 6 and 7 are all between the 108 and 133 foot planes. (Record pp. 71-74.) The amount of ore contained in these blocks was of the value of over $250,000.00, according to the testimony of the witness Parks.

It should be remembered that the amendment was not made until after the close of the testimony. The amendment did not change the dates between which it was alleged the ore was extracted. No objection was offered to the proposed amendment upon the ground that it extended the date of recovery. There was no objection to any of the evidence regarding the extraction of ore upon the ground that the same was uncertain as to the time when the ore was extracted, or that it related to ore extracted after June 26th, 1899. Furthermore, the court expressly instructed the jury thatt here could be no recovery for ore extracted after June 26th, 1899. The plaintiff in error could not have been prejudiced by the amendment, and there was no claim or basis for any claim that it was taken by surprise.

In concluding this branch of the case, we respectfully submit that no error was committed in permitting the amendment to be made. Lange vs. U. P. R. R. Co. 196 7

* * * *

Chapman vs. Barney 129 U. S. 677 - 680

The remaining assignments of error discussed relate to the charge of the court to the jury. It appears from the the record (pp. 199-200) that during the argument of the case the lower court directed the attention of the attorneys for the respective parties to the recent decision of

this court in the case of Mountain Copper Co. v. Van Buren, 133 Fed. 1, and to the case of Harney v. Tyler, 2 Wall 328, and advised counsel that Rule 58 would be construed in accordance with the decisions in these cases. The attorneys for the plaintiff in error are now presenting objections to several of the instructions given which were not made in the exceptions taken to the charge before the jury retired. We submit that, under the circumstances, such objections should not be considered by this court.

The first instruction complained of is No. 17. The only objection made to this instruction before the jury retired was "that it is contrary to law, is not sufficiently guarded and is misleading to the jury." (Record p. 203.) Such objection is wholly insufficient in view of the rule announced in the case of Harney v. Tyler, supra, which was approved by this court in the case of Mountain Copper Co. v. Van Buren.

It is said that this instruction in effect required the jury to find that the defendant was guilty of a wilful trespass in extracting ore subsequent to the commencement of the action. The instruction is not subject to any such interpretation. It does not relate to the nature of the trespass, but has reference solely to the weight to be attached to the evidence regarding the quantity and value of the ore taken. In other words, it relates to the same matter covered by the preceding instructions, 15 and 16. It in effect told the jury that the commencement of the action was notice to the defendant of the plaintiff's claim, and that with such notice if the defendant failed to keep an account of the quantity and value of the ore subsequently taken it should not be permitted to receive any benefit from the trespass, and that it was the duty of the

jury to resolve any doubt as to the value and quantity of the ore in favor of the plaintiff. This statement of the law was clearly correct.

Armory v. Delamirie, 1 Smith's Leading Cases, Pt. 1, p. 151.

Little Pittsburg etc. Co. v. Little Chief etc. Co., 11 Colo. 223.

Even though this instruction could be construed to relate to the nature of the trespass, which it can not, it correctly states the law when taken in connection with instructions 11, 12, 13 and 14.

It is next claimed that instructions numbered 11 and 18 are incorrect and that the court erred in refusing request No. 43 of the plaintiff in error. No exception was taken to instruction No. 11 before the jury retired, nor is there any objection to this instruction in the record. The only exception taken to the instruction numbered 18 before the retirement of the jury was that "it is contrary to law and does not correctly define what mining and milling expenses may be deducted." The request designated as No. 43 is not contained in the record. Under these circumstances the assignments of error relating to the instructions numbered 11 and 18 and request No. 43 should not be considered.

Instruction No. 11, however, is clearly correct and states the rule as announced by this court in the case of Sweeney v. Hanley, 126 Fed. Rep. 97.

See also

Reservation etc. Co. v. Fortune etc. Co., 129 Fed. Rep. 668.

The objection made to instruction No. 18 is not discussed in the brief of plaintiff in error.

The next assignment of error discussed relates to in-

struction No. 19. The exception taken to this instruction before the retirement of the jury is as follows: "It does not correctly define the possession plaintiff must have in order to support an action for trespass, and is not applicable to the facts proven and conceded in this case." (Record p. 205.) In the bill of exceptions subsequently presented further objections were made. (Record p. 209.) The objections to this instruction made in the lower court are not discussed by counsel for plaintiff in error, but another objection which was not presented in the lower court is considered. We submit that the court should not notice the objection now made for the first time in this court, and further submit that the instruction is correct as a matter of law. The objection that the plaintiff did not have such possession of the Drum Lummon vein as would entitle it to maintain an action of trespass is disposed of by the former opinion of this court. (102 Fed. Rep. 435.) The instruction as a whole correctly states the law.

Assignment of error XXXI is addressed to instruction No. 32. The only objection to this instruction made before the retirement of the jury was "that the same is contrary to law and would require the defendant to surrender its contention that such ore justly belongs to it." (Record p. 206.) Further objections are interposed in the bill of exceptions. (Record p. 211.) The contention made with reference to this instruction in the brief of plaintiff in error is not based upon any objection in the record.

The witness Burrell testified: "The ore from block 8, which was taken out after the modification of the injunction order, was taken down to the 190-foot level and from the 190-foot level to the 400. This ore was put in the chutes with other ore. All of the ore in the chutes was taken

out together." (Record p. 170.) The witness Mayger testified: "The ore taken from blocks 8 and 11 and all of the blocks between the 133-foot plane and the 108-foot plane outside of the ores that were taken in 1893, were all mixed together promiscuously from the 190-foot level to the 400." (Record p. 171.) No evidence was offered by the defense as to the value of the part of the ore extracted from block 8 removed under the authority of the court, and in fact proof of the value of the ore was impossible because the ore was mixed with other ores.

This court in its former opinion in the case (102 Fed. Rep. 436) said:

> "Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from 'disposing of, treating, and reducing any ores heretofore removed or extracted from said premises,' for the reason that such ores were held subject to the order of the court, and has not been converted to the use of the defendant. There is nothing in the pleadings or in the bill of exceptions to show that such ores had been returned or tendered to the defendant in error, or in any way accounted for; nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired to have the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to, or left in the possession of, the

defendant in error, and to have submitted evidence of their value."

What is said by the court in the foregoing quotation fully answers all objections to instruction No. 32.

Assignments of error XXIII, XXIV and XLIV are next discussed. These assignments relate to instructions 5, 8 and 11. It is claimed that the court erred in telling the jury "that the defendant must prove certain specified features 'to their satisfaction.'" (Brief p. 126.)

No objection to instruction 11 is contained in the record. The objections now urged to instructions 5 and 8 were not made in the lower court. The only objection interposed to these instructions was because the same do not correctly state the rule on the subject of burden of proof. (Record pp. 204, 205 and 208.)

When instructions 5, 8 and 11 are read in connection with instructions 14 (Record p. 190) and 25 (Record p. 195) the objection made disappears. Taking the instructions as a whole, the jury were told that they should only be satisfied by a preponderance of the evidence. It is a fundamental rule that in considering the correctness of an instruction the whole charge must be read.

In the case of Louisville & N. R. Co. v. White, 100 Fed. Rep. 230, a similar objection to an instruction was made, and it was held that the objection was not well taken.

The last assignments of error discussed in the brief of plaintiff in error refer to instructions 5, 8, 9, 14, 15, 16 and 20.

No exception whatever was taken to either instruction 9, 14, 15 or 16 in the lower court. The only exception to instruction 20 taken before the jury was sent out was "that it is misleading, contrary to law and unapplicable to the facts." This was clearly insufficient, in that it does

not point out any specific objection, as required by the rule announced by this court in the case of Mountain Copper Co. v. Van Buren, 133 Fed. Rep. 1. The sole objection to instruction 8 made before the jury retired was that "it is contrary to the law in that no presumption whatever arises with reference to the course of the discovery vein." (Record p. 205.) This is not the objection now urged.

Instruction 14 correctly states the law. In the case of Reservation Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. Rep. 668, decided by the circuit court of appeals for the Eighth circuit, it is said:

> "The wrongful taking of the ore, in the absense of all other evidence, raises a presumption of fact that the trespasser took it intentionally and wilfully. This presumption, however, is a disputable one, which evidence may so completely overcome that it will become the duty of the court to instruct the jury that it can not prevail."

See also:

> United States v. Homestake Min. Co., 117 Fed. Rep. 481, 486.
>
> St. Clair v. Cash Gold Min. Co., 47 Pac. Rep. 467.

Instructions 15 and 20, both of which relate to the same subject, are not open to criticism.

> Armory v. Delamirie, 1 Smith's Leading Cases, Pt. 1, p. 151.
>
> L. P. Min. Co. v. L. C. C. Min. Co., 11 Colo. 223.

The objections to instruction 16 are clearly without merit. It was proper under the circumstances of the case to receive evidence as to the value of ore in the vicinity.

> Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. Rep. 420.

If the word "vicinity" required defining, it was the privilege of the defendant in the case to request an instruction containing such definition, which it did not do. It is said that the instruction should have been limited "to ores similar in class." The presumption is that no evidence was received relating to the value of ores in the vicinity except ores of the same vein and of the same general character. It does not appear that any objection was offered to the introduction of any evidence as to value, because the ores were not of the same class.

Instruction 9 relates to the issue of title, and as this issue was disposed of by the former opinion and decision of this court as to the title is the law of the case.

Sweeney v. Hanley, 126 Fed. Rep. 97.

As a mater of fact, however, the law is correctly stated in this instruction.

Lindley on Mines, 2nd Ed., Vol. 2, Sec. 598.

There is no evidence that the discovery vein was a part of a system of veins, but on the contrary, according to all the evidence contained in the record, the discovery vein stands by itself without any spurs or off-shoots.

It is claimed that instruction 5 "shifted the whole burden of proof as to the discovery vein," and instruction 8 created "a presumption as to the continuity of the vein."

That instruction 8 was correct, see:

Wakeman v. Norton, 49 Pac. Rep. 283.

Lindley on Mines, 2nd Ed. Vol. 2, Sec. 615, and cases cited.

In considering the objection to instruction 5, it should be remembered that it was a conceded fact in the case that the Drum Lummon vein has its apex wholly within the St. Louis claim between the 520 and 108 foot planes, and partly within such claim between the 108 and 133 foot

planes. In view of this condition of affairs there could not possibly be a presumption that the plaintiff in error is the owner of the ores in controversy. All that the St. Louis Company was required to do at the second trial, was to establish its extralateral right to the discovery vein between the 520 and 133 foot planes. When it had done this the burden rested on the defendant to overcome the prima facie case resulting from the proof and presumption.

Whether or not the burden of proof ever shifts, it is not necessary to discuss. The court fully and correctly instructed the jury on the subject of burden of proof, and instruction 5 is not in conflict therewith. The supreme court of the United States in the case of Sturm v. Boker, 150 U. S. 312, 340, held that where the defendants in a case admitted that the signatures to a document were genuine but claimed that the body of the document was forged, the "burden of proof" was upon them to establish that the written part above the signatures was forged. In the case at bar, when the Montana Company admitted that the ore was taken from that part of the Drum Lummon vein which has its apex within the St. Louis claim, the burden was clearly upon it to show that it owned the ore.

Instructions 5 and 8 both relate to the issue of title, and this issue was foreclosed and eliminated from the case by the former decision of this court. Any inquiry with reference to these instructions is immaterial.

In concluding the discussion of this branch of the case, we respectfully submit that the charge, taken as a whole, contains a lucid and correct statement of the principles of the law applicable to the case.

* * * *

In the statement of the case contained in the brief of plaintiff in error it is said:

> "On the subject of damage, and as tending to show strongly and clearly the oppressive and outrageous character of the verdict, and the judgment standing against us, the business books of the plaintiff in error were introduced in evidence, and an abstract of them from Nov. 1st, 1898, to May 1st, 1899, the period when the ores claimed by the St. Louis Company, were mined and milled, appears, in the record, as "Defendant's Exhibit J." As tending to show still further the excessive character of this verdict, this record shows the amount of ore worked, and of bullion received for each period of six months, from 1893 to 1898, inclusive."

In this connection we desire to call the attention of the court to the testimony of the witness Burrell, manager of the Montana Company. He says: "Some of the ore taken out between the 108 and 133 foot planes was shipped to the smelter. It is true that high grade ore was often mixed with low grade ore in order to keep up the average of the mine." (Record p. 170.)

Although the question of the sufficiency of the evidence to sustain the verdict is not before this court, because of the evident purpose on the part of counsel for plaintiff in error to convey the impression that the verdict is excessive, we have had printed and appended hereto the opinion of the lower court in overruling the motion for a new trial.

In conclusion, we respectfully submit that no error was committed by the lower court on the second trial of the

case, and that the judgment of said court should be affirmed.

BACH & WIGHT,
JOHN B. CLAYBERG,
ARTHUR BROWN, and
M. S. GUNN,
Attorneys for Defendant in Error.

## MEMORANDUM OPINION DELIVERED BY DISTRICT JUDGE WILLIAM H. HUNT IN OVERRULNG MOTION FOR NEW TRIAL.

The principal ground upon which the defendant asks for a new trial is that the verdict is excessive. Accepting the law to be correctly stated by Justice Story in the case of Whipple v. Cumberland Manufacturing Company, 29 Fed. Cases 935, we have the general rule as follows:

> "We take the general rule, now established, to be, that a verdict will not be set aside in a case of tort for excessive damages, unless the court can clearly see that the jury have committed some very palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated. The authorities, cited at the bar, are entirely satisfactory and conclusive on this subject. Indeed, in no case will the court ask itself, whether, if it had been substituted in the stead of the jury, it would have given precisely the same damages; but the court will simply consider, whether the verdict is fair and reasonable, and in the exercise of sound discretion, under all the circumstances of the case; and it will be deemed so, unless the verdict is so excessive or outrageous, with reference to those circumstances, as to demonstrate, that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice, to mislead them." * * * "They may not be precisely, what we ourselves should have given, sitting on the jury; but we see no reason to say, that they can, in any sense, be treated as exces-

sive or unreasonable."

Applying this rule, I am clearly of the opinion that the motion should be overruled. Without entering upon an elaborate statement of the evidence, I shall content myself by saying that unless the verdict is against the rules of law, or unless it appears that the jury have suffered their passions, their prejudices or their perverse disregard of justice, to mislead them, it must stand.

It appears that Parks and Keerl, two of the witnesses for the plaintiff, made a survey of the stopes and cavities from which ore had been taken, for the purpose of determining the quantity of ore extracted. Parks in his testimony says:

> "Mr. Keerl and myself made a careful survey of the ground and actually measured all of the stopes and cavities from which ore had been removed."

Parks designated the different stopes as blocks, and they were referred to in the testimony as such. In some instances a single stope contained two blocks, and the division of the stope was made because a part of the stope was on one side of the 108 foot plane, and a part on the other, and it was contended on the former trial of the case that the plaintiff was limited in its recovery to the ore extracted north of the 108 foot plane. Blocks 4 and 9 constituted a single stope and are divided by an imaginary plane. The same is true of blocks 5 and 10. The defendant admits that all of the ore taken from the vein north of the 133 foot plane and east of the west line of the compromise strip, except the ore extracted in extending the 40 foot tunnel and the ore extracted in extending the 20 feet level to the north side of the defendant's apex shaft and blocks 4 and 9 was extracted by it. The question of

whether or not the ore in blocks 4 and 9 has been removed, and if so by whom, was disputed and was clearly a matter for decision by the jury. There was ample evidence to sustain a finding by the jury that these blocks had been removed by the defendant.

As a matter of fact this action was instituted in September, 1893, and at least from that time the defendant had notice that it would be called upon to account for the ore extracted. No proof was offered by the defendant of the tonnage of the ore taken out, although the defendant could have determined the tonnage by weighing the ore and also by measuring the stopes the same as the plaintiff did. The witness Burrell, manager of the defendant company, testified that all of the ore between the apex shaft and the 133 foot plane was extracted prior to June 1st, 1899. According to the measurements of the stopes made by the witnesses for the defendant, the ore extracted from blocks 1 to 10, inclusive, amounted to 2,118.9 tons. Calculating the tonnage of the ore outside of these blocks between the two planes, assuming the thickness of the ore body to be 7.29 feet horizontally and 6.18 feet at right angles to the walls, which Parks testifies is the average width of the different stopes, we obtain a result of 1,040.53 tons. Adding this amount to the tonnage in blocks 1 to 10, inclusive, a tonnage of 3,158.62 tons is obtained. As the plaintiff could only determine the width of the ore bodies from the width of the stopes, and it was possible for the defendant to produce evidence, showing the tonnage of the ore extracted, which it did not do, the jury were entitled to regard the width of the ore body as plaintiff's witnesses testified to it. The plaintiff was required to produce the best evidence which it has been able to obtain concerning the matter. In determining the tonnage, Parks adopted as a basis 13

cubic feet per ton. In order to ascertain the number of cubic feet required to make a ton he made tests of the specific gravity of the ore.

Counsel for defendant contend that the width of the ore body did not exceed five feet, that blocks 4 and 9 should not be included, that there was at least five feet of surface wash which should be deducted, and that the ore between the apex shaft and the 108 foot plane has not been extracted. They contend that acording to the weight of the testimony the tonnage of the ore extracted does not exceed 1,728 tons. As the defendant could have furnished evidence showing the exact amount of ore extracted, but has not done so, the jury under the rules of law were justified in resolving uncertainty as to the amount of the ore, in favor of the plaintiff. There was evidence showing the the average width of the stopes to be over 7 feet. If we calculate the quantity of the ore upon the basis that the width of the ore body was 7 feet, and allow all the other claims of the defendant with reference to the deductions that should be made, the tonnage would be in excess of 2,400 tons. If, however, we treat blocks 4 and 9 as having been extracted by the defendant, the tonnage would be increased by over 100 tons, or the total tonnage would exceed 2,500 tons.

It is claimed by counsel for defendant that in determining the value of the ore extracted, there should be accepted as the basis for the calculation the average value per ton of the ore extracted by the plaintiff from the Drum Lummon vein, for which it received approximately $111,000.00. The ore extracted by the plaintiff in extending the 40 foot level beneath the compromise strip was included as a part of the ore from which it realized this sum of $111,000.00. The defendant on June 10th, 1895, instituted an action

against the plaintiff to recover for the ore taken from beneath the compromise strip in extending the 40 foot tunnel and alleging the quantity to be 224 tons of the value of $45,766.00. So we find that of the ore extracted by the plaintiff from the vein at least 224 tons which was taken from along the strike of the vein between the 108 and 133 foot planes, was of the value of over $200.00 per ton. It is in evidence that the ore in the vein decreases in value as you go northward from the 108 foot plane. The ore taken by the plaintiff was taken from above the 85 foot level and west of the compromise strip. A part of the ore was necessarily of the same value of blocks 4 and 9. To what extent the ore decreased in value as you go northward along the strike of the vein from the west line of the compromise strip does not clearly appear. It does appear, however, that a small quantity of the ore to the east of the west line of the compromise strip was taken by the plaintiff. The defendant commenced an action against the plaintiff to recover for this ore or its value, and alleged the quantity of the ore to be 8 tons, and its value $1,600.00. During the trial of the case several tons of ore taken from a drift north of the Montana Company's apex shaft and immediately above what the plaintiff designates as blocks 4 and 9 were sent to the smelter. The returns from this ore show its value to be one hundred and thirty dollars and some cents per ton, the smelter returns, too, representing but 95 per cent of the assay value. It also appears that there was from 16 to 20 per cent of waste in the ore. If an allowance is made for the waste, the assay value would be over $160.00 per ton. It further appears that this ore did not include the rich ore on the hanging wall. A sample of this rich ore was produced and assayed, which showed a value of over $360.00 per ton. Parks, from samples

taken by him, determined the value of the ore extracted from block 1 to be $145.00 per ton, from block 2 to be $146.02 per ton, from block 3 to be $203.88 per ton, from blocks 4 and 9 to be $165.10 per ton, and from blocks 5, 6, 7 and 10 to be $127.14 per ton, and from block 8 to be $13.28 per ton. Block 8 contained only 168.3 tons. Other evidence was produced showing the assay value of the samples of the ore taken from between the planes. One of these samples showed a value of $261.70 per ton, another a value of $112.12 per ton.

It is in evidence that the Montana Company's apex shaft was sunk to a depth of over thirty feet in 1903. There is also some evidence that blocks 4 and 9, or a part thereof, were extracted in the same year. All of the ore taken by the defendant was extracted prior to June 1st, 1899. The jury were therefore warranted in allowing interest on the part of the value of the ore taken, from 1903, and on the value of the ore taken from June 1st, 1899. The verdict was for $195,000.00. Calculating the tonnage at 2,500 tons, the verdict would represent a value per ton of $78.00, without interest. If interest was allowed from June 1st, 1899, which would be, at the legal rate, for convenience, let us say approximately 50 per cent, the value of the ore as determined by the jury was $130,000.00, or $52.00 per ton.

As I believe the jury were correctly instructed as to the rule of damages which applied to the case, the quantum of damages was a question for them, subject, of course, to the power of the court to set aside their verdict if the damages awarded were so great as to indicate passion or prejudice on their part. I think it proper for me to say that the jury was exceptional in its intelligence. They gave the closest consideration to the testimony, and to assist them were allowed by consent of counsel to take memoranda

of the specific claims made as to the amount and value of ores alleged to have been taken by the defendant. The contentions of counsel were argued before them with detailed analysis. They deliberated nearly 24 hours, and rendered a verdict, which though in a sum much less than the plaintiff asked for, is supported by the evidence, and in the absence of circumstances or facts which demonstrate that it is excessive, must be upheld as fair and reasonable.

The other grounds of motion for a new trial, addressed particularly to the law as given in the charge, are not well taken, in my judgment. The general verdict was the announcement to the court of the answer or judgment of the jury, finding that the facts established by the evidence were as plaintiff alleged, and as put in issue by the pleadings. The verdict was a conclusion, made after deliberation, upon facts found to the satisfaction of the jurors,—facts necessarily established to their satisfaction, subject always to rules of law as given by the court. Satisfaction may be by a preponderance of evidence in some instances, as here where general instructions were given upon burden and preponderance; or it may be by proof of a fact beyond a reasonable doubt, as in criminal cases; or it may be by presumptions, which, at law, unless overcome, direct the mind to satisfaction of the truth of an allegation. But, in each instance, evidence to the satisfaction of a jury means such evidence as in amount is adequate to justify them in adopting the conclusion in support of which it is adduced.

Sections 3112-3390, Mont. Code Civ. Proc.

Taking the whole charge therefore, I cannot believe the jury could have understood the word "satisfaction" as requiring a degree of proof higher than that demanded by the law, which was explained generally.

Regarding it as unnecessary to discuss further the

grounds stated in defendant's motion, they will be overruled, as not well taken. Motion denied.

August 21, 1905.

WILLIAM H. HUNT,

Judge.

No. 1240.

IN THE

# United States Circuit Court of Appeals

FOR THE

## NINTH CIRCUIT.

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THE MONTANA MINING COMPANY, LIMITED,
*Plaintiff in Error,*

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
*Defendant in Error.*

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# SUPPLEMENTAL AND REPLY BRIEF OF PLAINTIFF IN ERROR.

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CHAS. J. HUGHES JR.,
W. E. CULLEN,
*Attorneys for Plaintiff in Error*

HIESTER, *Printer*, 559 California St.

IN THE

# United States Circuit Court of Appeals

## NINTH CIRCUIT.

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MONTANA MINING COMPANY, LIMITED,
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vs.

ST. LOUIS MINING AND MILLING COMPANY,
*Defendant in Error.*

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ASSIGNMENTS OF ERROR XXIII, XXIV and XLIV (Original Brief, page 126).

*Ruff et al. vs. Jarrett,* 94 Ill. 475:

"The fifth instruction given for appellee is erroneous and should not have been given. It informs the jury that there can be no fraud without an intention to deceive, and unless they were *satisfied* by a preponderance of the evidence. * * * It was also erroneous in saying to the jury that they must be satisfied by a preponderance of the evidence. This was improper, as it imposed a higher degree of proof than is imposed by the law. The jury were only required to believe from a preponderance of the evidence, and not to be satisfied by the proof, as the instruction requires. Satisfactory evidence

almost excludes doubt, whilst belief from a preponderance does not, but leaves the balance in the mind on one side of the proposition."

*Stratton vs. Central City Horse Railway Co.*, 95 Ill. 25:

The court in this case instructed the jury that the defense of contributory negligence must be proved to the satisfaction of the jury. The court says:

"This language is too strong. Juries are required in civil cases to decide facts upon the weight or preponderance of the evidence, and this, too, where the proof does not show the fact in question to the satisfaction of the jury. In such cases the jury may find any given fact in a given way, upon their judgment as to the weight or preponderance of the evidence, though they may have reasonable doubts as to the real truth."

*Graves vs. Colwell*, 90 Ill. 612:

"The jury are instructed that where a deed is made to one of two persons of the same name, being father and son, the presumption of law, in the absence of evidence upon the subject, is that the deed was made to the father and not to the son, and this presumption must prevail unless the defendants have overcome the presumption by proof showing to the satisfaction of the jury that the deed was made to the son and not to the father. * * *

"2. * * * The burden of proof is upon the defendants to show, to the satisfaction of the jury, that the Thomas Colwell from whom the plaintiff claims title

was not the person who in fact owned the land and held the title for the same; and unless the jury believe from the evidence that the defendant has overcome this *prima facie* case, and shown, to the satisfaction of the jury, * * * they will find for the plaintiff. * * *

"The jury must have understood they were required, notwithstanding they may have believed that the defendants had made out a *prima facie* defense, by proving circumstances of sufficient weight to shift the burden of proof and thereby set aside the rebuttable legal presumption that otherwise would have enabled plaintiff to recover without proving the material fact in issue, and on which his case was predicated, nevertheless, to return a verdict for the plaintiff, even though the weight of evidence was against him, unless the preponderance of proof was so greatly in favor of defendants as to satisfy their minds, a thing which could only be accomplished by producing a state of moral certainty, or, in other words, by proving beyond a reasonable doubt that the son and not the father was intended. The instructions assume and the record shows the evidence was conflicting; in that state of the case, it being a civil suit, it was required of neither party more than that it should produce a preponderant weight of testimony."

*Herrick vs. Gary*, 83 Ill. 85:

The instruction was: "In order to recover in this case the plaintiff must show, by the evidence in the case, to the satisfaction of the jury, etc."

Of this instruction and the objections to it the court said:

"The objection to this instruction is manifest. The first branch of it places the standard of the degree of proof required higher than the law demands in controversies of this character. It is enough that the jury shall believe from the evidence that the essential facts are true. The jury may so believe, although the same may not be shown by the evidence to the satisfaction of the jury. This instruction requires not merely that the evidence shall produce belief in the mind of the jury of the facts, but that such belief shall be so strong as to be satisfactory. This is, perhaps, not quite so strong as to require a belief beyond a reasonable doubt, but it approximates it, and which is only required in criminal cases. * * * There are subsequent phrases in the instructions which do not seem to demand a degree of proof so high, but the phraseology is not clear and plain, and, as a whole, the instruction was liable to mislead the jury." Judgment reversed.

*Wollf vs. Van Housen*, 55 Ill. App. 295:

"The court, by one instruction, told the jury, 'before you can find the accused guilty, you must be satisfied, from a preponderance of the evidence, that he had carnal knowledge of said plaintiff forcibly and against her will.' The word 'satisfied', in the first instruction, is too strong. Judgment reversed."

*Connelly vs. Sullivan*, 50 Ill. App. 627:

The instruction was:

"The jury are instructed that in this case the burden

of proof is upon the party offering the will in controversy for probate, and such party must furnish the preponderance of evidence to establish the validity of the will in controversy; and they must satisfy the jury, by a preponderance of the evidence, that the person who executed the instrument in controversy was Bridget Connelly and no other person, etc. * * * As construed by the supreme court, 'satisfy' and 'satisfied' are words too strong to be applied to the state of mind upon which jurors may act. Judgment reversed."

*Mitchell vs. Hindman*, 47 Ill. App. 431:

This was an action against a doctor for the recovery of damages resulting from alleged malpractice. The declaration charged that the appellants so unskillfully and negligently performed their duty as such surgeons and physicians that the injured arm became permanently disabled. The court said:

"The instruction offered on behalf of the defendants, as to the character of proof required, and refused by the court, of which complaint is made, was clearly bad. It was, 'The jury are instructed, on behalf of the defendants, that plaintiff in this case is bound to prove, *to the satisfaction of the jury,* by a *clear* preponderance of the evidence', etc. This instruction is defective in the use of the words italicized." (The words italicized are "to the satisfaction of the jury" and the word "clear".

The error complained of was the refusal to give the instruction as requested. The ruling below was affirmed. The case was appealed from the Court of Ap-

peals to the Supreme Court and affirmed there, the Supreme Court saying:

"The sixth instruction asked by the appellant was refused. It was that the plaintiff was 'bound to prove to the satisfaction of the jury by a clear preponderance', etc. This instruction was clearly erroneous. The law only requires that a preponderance of the evidence shall be in favor of the plaintiff."

*Gooch vs. Tobias,* 29 Ill. App. 268:

Action for trespass for destroying goods.

Instruction: "The court instructs the jury that, while circumstantial evidence is legal and competent in this case, yet in order to make his case by circumstantial evidence, plaintiff must have proved such circumstances *as to satisfy the jury* by a preponderance of the evidence that the defendant committed the wrongful act charged."

It was held that a higher degree of proof was required by this instruction than is required in civil cases, and the judgment was reversed.

*Willis vs. Chowning,* 40 S. W. Rep. (Tex.) 395:

Instruction: "* * * Unless the evidence before you establishes *to your satisfaction,* etc. * * * The law required Chowning to establish his allegation by the preponderance of the evidence, but the charge of the court required him to produce evidence sufficient to establish greater degree of certainty in the minds of the jury than was demanded by law, which was error, for which this judgment must be reversed."

*Texas etc. Co. vs. Ballinger,* 40 S. W. Rep. (Tex.) 822:

"This *prima facie* case can only be rebutted by the defendant showing to your satisfaction, etc. * * * In civil cases the party holding the burden of proof is entitled to a verdict if he establishes his cause of action or defense by producing a preponderance of evidence. This preponderance *may not satisfy* the jury, but it is in law all that is required of him. For this error in the charge we are compelled to reverse the judgment."

*McGill vs. Hall,* 26 S. W. Rep. (Texas) 32:

"The special charge given at the request of appellees required the appellant *to establish to the satisfaction of the jury, by legal evidence, all the material allegations of his cross-bill.* The Supreme Court has condemned charges of this character, and we will follow those decisions and hold likewise. We cannot say that the jury was not influenced by the charge, and we must be in a position to say this before we could hold that an erroneous charge was harmless.

In the cases of *Feist vs. Boothe,* and *Fordyce vs. Chancey,* it was held that the use of the word 'satisfied' in an instruction in a civil case, required too high a degree of proof, and that such instruction constituted reversible error."

*Gage vs. Louisville etc. Co.,* 14 S. W. Rep. (Tenn.) 73:

"The court charged the jury: 'In every law suit the plaintiff says, substantially, "I know the origin and

occasion of the loss of which I now complain, and will establish to the full satisfaction of the jury, by clear and convincing proof of witnesses I know of, and will introduce, that the defendant, whom I have compelled to come into this court, is responsible in damages to me for the loss." ' This statement of the rule is entirely too vigorous, and puts upon the plaintiff the duty of making out his case beyond a reasonable doubt, which is only required on the part of the State in criminal prosecutions. It is sufficient in civil cases if, after weighing the evidence on both sides, a preponderance is the one way or the other. * * * The burden is upon the plaintiff to make out his case, and he is only required to do so by a preponderance; but when he has done so, he is entitled to recover." Judgment reversed.

*McMillan vs. Baxley,* 16 S. E. (N. Car.) 845:

An instruction was prayed in which the words "to the satisfaction of the jury" as expressive of the degree of proof required, were used. The court substituted for the words "to the satisfaction of the jury" the words "by a preponderance of evidence." "The phrase 'to the satisfaction of the jury' is considered to bear a stronger intensity of proof than that of 'by a preponderance of evidence'; but we know of no rule of evidence which would require of the plaintiffs a stronger degree of proof than is ordinarily required of the plaintiff in a civil action."

*Torrey vs. Burney,* 21 So. (Ala.) 349:

"The fifteenth assignment of error is based upon the following instruction given to the jury: 'The undue

influence which will avoid a will must amount to coercion or fraud; and unless the contestant has, by the testimony in this case, *satisfied the jury* the will filed for probate was not the act of Mr. Torrey, but the will of another, and that the same was induced to be made by such influence as amounts to coercion, they will find for the proponent on the issue of undue influence.' It is insisted by contestant that the burden placed by the charge, 'to satisfy the jury' of the coercion or undue influence, is greater than that imposed by the law; that to *satisfy the jury* means that there must be no doubt or uncertainty in their minds, where as all that could properly be required was to reasonably satisfy the jury that there was undue influence. We are of opinion that the objection is well taken. Before it can be said that the mind is 'satisfied' of the truth of a proposition, it must be relieved of all uncertainty, and this degree of conviction is not required, even in criminal cases." Case reversed.

*Evans vs. Montgomery*, 55 N. W. Rep. (Mich.) 362:

"The court refused to instruct the jury that 'the only testimony offered by the plaintiff in regard to the making of the contract between the plaintiff and defendant is that of the plaintiff himself'; also, that 'you are not authorized to find, except upon clear and convincing proof', etc. The court committed no error in refusing these requests."

*Schenk vs. Dunkelow,* 37 N. W. Rep. (Mich.) 886:

Action on the case against defendant for trespass upon the person, charging assault and battery combined with aggravated circumstances of ravishment, resulting in pregnancy and the subsequent birth of a child.

"The facts necessary to be proved and the testimony essential to establish them to entitle the plaintiff to recover under the defendant's theory, are fully stated in the following three requests presented by him for the court to charge:

* * * * * * * *

"3. That the right of the plaintiff to recover in this case does not depend alone on the question of whether or not the defendant is the father of plaintiff's child, but on the fact of whether the defendant is guilty of the crime of rape, and unless you are satisfied of the fact that the defendant is so guilty, your verdict must be 'no cause of action'."

On the contrary of this proposition the plaintiff claimed it was not necessary for the plaintiff to show that the assault was committed with such force and violence as to constitute the crime of rape; nor was it necessary to establish any fact in the plaintiff's case by more than a preponderance of the evidence to enable her to recover. The claim of counsel for plaintiff was correct and the defendant's theory was erroneous."

*Mitchell et al. vs. Hindman,* 150 Ill. 540:

"The sixth instruction asked by the appellants was refused. It was, that the plaintiff was 'bound to prove

to the satisfaction of the jury, by a clear preponderance', etc. This instruction was clearly erroneous. The law only requires that a preponderance of the evidence shall be in favor of the plaintiff. *Crabtree vs. Reed,* 50 Ill. 207; *McDeed vs. McDeed,* 67 *id.* 545; *Peak vs. The People,* 76 *id.* 289; *Bitter vs. Saathoff,* 98 *id.* 266."

*Fordyce vs. Chancy,* 21 S. W. 183:

"But the special charge requested (No. 5) required that the jury be 'satisfied' that the apprehended results would flow from the injuries. This exacted too high a degree of proof for a civil case, and the charge was properly refused."

*O'Donohue vs. Simmons,* 12 N. Y. Supp. 843:

"The court also, in stating to the jury that they should be thoroughly satisfied that the conduct of the auctioneer was not merely negligent or careless, was giving them an incorrect standard as to the conclusiveness of proof. In a civil case the jury need not be thoroughly satisfied of any fact claimed to be proven. If there is a preponderance of evidence in favor of the fact, they are bound so to find, whether they are thoroughly satisfied or the proof is conclusive to their minds or not."

*Fernandes vs. McGinnis,* 25 Ill. App. 167:

"The first and third are objectionable for the reason that they require the plaintiff to make out his case by proof 'to the satisfaction of the jury'.

"In *Herrick vs. Gary,* 83 Ill. 85, the Supreme Court, in commenting upon an instruction containing this requirement, say that it places the standard of proof

higher than the law demands in civil controversies; that it is enough that the jury shall believe from the evidence, the essential facts are true, and that they may so believe, though the same may not be shown by the evidence 'to the satisfaction of the jury'. 'This instruction requires not merely that the evidence shall produce belief in the minds of the jury of the facts alleged, but that such belief shall be so strong as to be satisfactory. This is, perhaps, not quite so strong as to require proof beyond a reasonable doubt, but it approximates it. The mind cannot well be satisfied as to a given proposition so long as such matter remains at all in doubt. For this reason the instruction must be condemned.'

"In the case of *Graves vs. Colwell,* 90 Ill. 612, a similar view was expressed. See, also, *Buchman vs. Dodds,* 6 Ill. App. 25. In each of the cases cited it was held that the error was substantial and calculated to affect injuriously the rights of the party complaining. We must so hold in the present case."

*Bauchwitz vs. Tyman,* 11 Ill. App. 187:

"This instruction imposed upon the defendant a higher degree of proof than the law requires. In civil suits a preponderance of the evidence is all that is necessary. Here the jury were told that the defendant must *satisfactorily* prove that he had paid the rent. Under such an instruction the jury might have said, 'though we are of opinion that the evidence preponderates in favor of the defendant, we are, nevertheless, not quite satisfied about it, and so we find for the plaintiff.' The instruction, as given, was liable to mislead the jury, and was therefore improper."

*Hutchinson Nat. Bank vs. Crow,* 56 Ill. App. 567:

"The eighteenth instruction for the interpleader is as follows:

"'The court instructs the jury for the interpleader that when fraud is set up the party alleging fraud must prove it by a preponderance of the evidence, so clear and cogent that it leaves the mind well satisfied that the charge is true. And in this case if you believe from the evidence that the plaintiff in attachment has not so proved the fraud alleged in this case, you should find for the interpleader, if you believe from the evidence the property is his.'

"The law does not require such a degree of proof in a civil suit. It is sufficient if the jury believe a material fact in issue from the evidence, even if the proofs do not generate a belief which entirely satisfies their minds. *Mitchell vs. Hindman,* 47 Ill. App. 431; *Connelly vs. Sullivan,* 50 Ill. App. 629; *Herrick vs. Gary,* 83 Ill. 85; *Stratton vs. Central Ry. Co. etc.,* 95 Ill. 25."

*Bryan vs. Chicago, R. I. & P. Co.,* (Iowa) 19 N. W. 296:

"The language of the court is capable of being understood as conveying the thought that the preponderance of evidence is found only where the mind is fully convinced of the truth of the testimony which controls the decision. This is incorrect. In civil cases a fact may be found in accord with the preponderance of the evidence, and yet the mind may be left in doubt as to the

very trust. The triers of an issue in such cases should, when doubts arise, find for the side whereon the doubts have less weight."

## *WILLFUL TRESPASS.*

ASSIGNMENTS OF ERROR NUMBERS XXIII, XXIV, XXXVIII, XLV, XLVI, XLVIII (Printed Brief, page 127):

In *Golden Reward Mining Company vs. Buxton Mining Company,* 97 Fed. 413, the Eighth Circuit Court of Appeals, opinion by Judge Thayer, said:

"This court has twice decided, as a proposition of general law, and, as we think, in accordance with the decided weight of authority on that point, that a person who invades another's property, and appropriates and removes therefrom valuable timber, and does so in the honest belief that it belongs to him, or that he has the right to appropriate it, can only be held liable to the true owner of the converted property, if it is ore, for its value as it was in place (that is to say, in the mine before it was broken down), whereas, if the trespass was committed willfully and intentionally, or if the trespasser was so far negligent as to justify an inference that he acted knowingly and intentionally, then he may be held liable for the value of the ore taken, with interest thereon from the date of the conversion. * * *"

*1 Sherman & Redfield on Negligence,* page 6, section 7:

"Exemplary, vindictive or punitive damages can never be recovered in actions upon anything less than

gross negligence. Of this there can be no doubt. There are many reported cases of mere ordinary negligence, in which damages have been awarded by juries to so large an amount as to seem equivalent to exemplary damages; but, where such verdicts have been allowed to stand, it has been upon the ground that the court could not clearly see that the amount awarded was more than a just compensation for the injury. It is often said that exemplary damages may be awarded for gross negligence. But it should be distinctly understood that the gross negligence for which such damages can be allowed, means such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others. And such appears to us to be the construction put upon these words by the courts, in the cases referred to. It is only in cases of such recklessness that, in our opinion, exemplary damages should be allowed."

In the case of *Wabash Ry. Co. vs. Speer,* 156 Ill. 244, the court said:

"But while this may be true, we think it too plain for argument that the instruction, as modified and given to the jury, was erroneous and misleading. After stating that to entitle the plaintiff to recover it must appear that the whistle was needlessly and willfully blown, it proceeds to define those terms as meaning, merely, that the whistle was needlessly blown and that the servant who blew it knew of the proximity of the plaintiff's team to the railway. Mere knowledge on the part of

the defendant's servant of the proximity of the plaintiff's team to the railway was thus made equivalent to or conclusive evidence of willfulness, provided the blowing of the whistle turned out to be needless. The defendant's engineer may have blown the whistle in perfect good faith, and with an honest belief that in blowing he was observing the plaintiff's safety in the best possible way, still, according to the instruction, if it turned out that the blowing was unnecessary, the act was to be deemed willful, wanton or malicious. It needs no argument to prove that such is not, and cannot be, the law."

The law is thus set out in *Black's Law and Practice,* section 152:

"It has been held that a charge of willful injury is not sustained by evidence of mere negligence, nor can proof of willful injury be made under a charge of negligence merely."

And in *Thompson on Trials,* Volume II, Paragraph 2251:

"On like grounds, when the declaration of a suit against a municipal corporation for a personal injury alleged malfeasance merely, and the defendant's proof made out no more than a case of nonfeasance, it was held a proper case for a non-suit."

*Durant Min. Co. vs. Percy Con. M. Co.,* 35 C. C. A. 255;

*United States vs. Homestake Mining Co.,* 54 C. C. A. 305.

The presumption is that the owner of land, mining claim, etc., is the owner of all that lies within its surface boundaries extended downward vertically. This applies to mining claims as well as other real estate.

*Wakeman vs. Norton*, 24 Colo. 192; 49 Pac. 283:
18 Morrison's Mining Reports, 698:

*Syllabus:*

"*Recovery on Possession.* Plaintiff in trespass in possession under paper title may recover without proof of his chain of title against a party defending under a separate title, to wit: a lode dipping underneath the plaintiff's location.

It is to be presumed that the owner of a mining claim is the owner of all deposits of ore within the side lines of the location, until it shall be shown by a preponderance of the testimony that such deposits are part of a lode having its top or apex within the boundaries of another's claim."

Goddard, Judge, in the opinion, says:

"But, assuming that the validity and ownership of the Zona K claim was sufficiently established for this purpose, appellant still contends that the evidence introduced on the part of appellee was wholly insufficient to entitle him to a recovery, since it failed to show that the vein from which the ore in question was taken had its top or apex within the boundaries of that claim, and insists that the burden rests upon appellee to establish the fact that the ore was taken from a vein or lode whose top or apex is within the surface lines of his claim, to entitle him to a recovery therefor. In other

words, that, so long as the intruder does not interfere with a vein whose top or apex is within the surface boundaries of plaintiff's claim, he has no right of complaint, regardless of the fact that ore is taken from within his ground, by one who neither has nor claims the lawful right to take the same.

With this contention we cannot agree. While it is true that the locator of a mining claim takes it subject to the right of others to follow and take ore from any vein on its dip through his ground, the top or apex of which is included within another valid lode location, yet we think he is entitled to the presumption that what is contained within his surface boundaries is his, until the conditions upon which such extralateral right depends are shown to exist, by the one who seeks to avail himself of such right. In *Mining Co. vs. Fitzgerald*, 4 Morr. Min. Rep. 380, Fed. Cas. No. 8,158, Judge Hallett thus concisely states what we believe to be the correct rule in such cases:

'Within the lines of each location, the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top or apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere.'

To the same effect are *Doe vs. Mining Co.*, 54 Fed. 935; *Consolidated Wyoming M. Co. vs. Champion M. Co.*, 63 Fed. 540; *Duggan vs. Davey*, 4 Dak. 110, 26 N. W. 887; *Cheesman vs. Shreve*, 16 Morr. Min. Rep. 79, 37 Fed. 36; *Iron Silver M. Co. vs. Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177; *Iron Silver M. Co. vs. Campbell*, 17 Colo. 267, 29 Pac. 513.

In this view the plaintiff's evidence was *prima facie* sufficient to show his ownership of the ore taken from within the ground of the Zona K claim, and it devolved upon the defendant to show his right thereto by a preponderance of evidence. The motion for non-suit was properly denied. From this conclusion it follows that, in meeting the burden imposed upon him to show his right to the ore in question by reason of the ownership of a vein or lode the apex of which was included within the surface boundaries of the Ethlena claim, the defendant was entitled to have the jury correctly informed as to the law defining the rights of the owner of such a vein, and prescribing the conditions under which he is entitled to extralateral rights."

*Iron Silver Mining Co. vs. Elgin Mining and Smelting Co.*, 118 U. S. 196:

*Syllabus:*

"Under the Act of Congress of 1872 (R. S. Sec. 2320 *et seq.*) parallelism of the end lines of a surface location is essential to the existence of any right in the locator or patentee of a surface lode mining claim to follow the vein outside of the vertical planes drawn through the side lines. His lateral right by the statute

is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction; that is, between parallel vertical planes. It can embrace no other portion."

In this case the court held that the form of the Stone claim was such that it had no extralateral rights, and then concluded with this language:

"The premises in controversy are admitted to be under the surface lines of the Golden Edge claim eastward from the defendant's claim, and the plaintiffs were therefore entitled to recover them."

*Leadville Mining Co. vs. Fitzgerald,* 4 Morrison's Mining Reports, 380; Fed. Case No. 8,158:

"As a starting point in the evidence before you the fact appears to be established that large quantities of valuable ore have been found in the Carbonate claim. This may be taken to show that a lode exists in that locality in so far as the question relates to the boundaries of that claim. That is to say, if the question for present consideration related to the ownership of ore within the surface limits of the Carbonate claim, it would not be necessary to consider very carefully the position of the ore in the earth. Because within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top and apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator

covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere."

*Consolidated Wyoming Gold M. Co. vs. Champion Min. Co.*, 63 Fed. Rep. 540:

*Syllabus:*

"4. *Same—Burden of Proof.*

Under Statute 1872 (Rev. St. Sec. 2322), giving a locator the right to all veins throughout their entire depth, the apexes of which lie within the surface lines of his claim, though in their course downward they extend outside the vertical side lines of the claim, a locator cannot take mineral from the claim of another without showing by a preponderance of evidence that it is part of a vein having its apex in his own claim."

The opinion is by Judge Hawley, District Judge. At page 550, the court discusses the rights of one asserting an apex and of one owning the surface of a claim beneath which ore is found, and in the course of such discussion, says:

"But the court is not prepared to say that the fact of its existence to that extent has been proven to its satisfaction; and this should be clearly shown before the court would be justified in giving to complainant the right to follow underneath within the surface lines of the New Year's and New Year's Extension claims, belonging to respondent. The respondent has the un-

doubted right to say to complainant, 'Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim, of which you are the owner'. Judge Hallett, in *Leadville Min. Co. vs. Fitzgerald,* 4 Morr. Min. R. 385, Fed. Cas. No. 8,158, expresses the true rule upon this subject, as follows:

'Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall show by a preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere.'

See, also, *Doe vs. Mining Co.,* 54 Fed. 937; *Duggan vs. Davey,* (Dak.) 26 N. W. 892."

*Duggan vs. Davey,* 26 N. W. Rep. 887:

*Syllabus:*

"1. *Mining Patents—Rights of Holder as against Intruder—Proof Required.*

One holding the patent of the United States for a mining claim is entitled to challenge the right of any intruder within the lines of his claim, and to require him to justify such intrusion by proprietorship of a

vein having its top or apex in some other claim, and the pursuit of which on its downward course has brought him to the ground in controversy."

Judge Church, in his opinion, at page 890, says:

"It will be observed that there is no controversy respecting the surface of the Silver Terra claim; of that the plaintiffs are in unquestioned possession, and it is unquestionably embraced within their patent. The ore body in controversy is some hundreds of feet below the surface, and has been reached by a tunnel upwards of 600 feet long. Nor are they asserting a right to anything beyond or outside of that segment of the earth which would be included within planes extended vertically downward through the lines of their claim. They are merely resisting an encroachment upon mineral deposits within that segment. Let us consider, therefore, the nature and incidents of the title acquired by possession, location and patent of mineral lands.

The common law rule is familiar. The ownership and possession of the soil extended to the center of the earth, and *usque ad caelum,* and included everything upon its surface and within its bosom. We find that the thing, the substance of which the United States statute treats, is 'lands valuable for minerals,' and that it is for the disposition of these 'lands' that provision is made in chapter 6 of the Revised Statutes. It is the 'lands' in which mineral deposits are found which are 'open to purchase.' It is 'land' claimed and located for valuable mineral deposits, which is the subject of application for patent, and where patent of the United States

issues, it is for the 'land', at so much per acre. The definition of 'land' given in our territorial statute is concise: 'The solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.' In the absence of anything in the statute to the contrary, we think it might well be concluded that one becoming the owner or possessor of any of these lands would hold them with and subject to all the incidents of ownership and possession at common law. It should be borne in mind that before the enactment of any statute recognizing and regulating his possessory rights, the mining locator, as between himself and the United States, was technically a mere trespasser upon the public domain; and that even although he might have conformed in his location to the rules and customs adopted in the mining district in which his claim was situated, yet, so far as any legal right existed to hold his claim against a new-comer, that right rested upon possession merely; hence the statute. Rev. St. U. S., Sec. 910.

The government, however, having, in pursuance of its policy of encouraging the discovery and development of its mineral wealth, long tacitly recognized the possession of the miner, has now, by statute, not only given an express license to those establishing their possession in the prescribed method, and provided a way by which the locator may become the owner in fee of the land embraced within the lines of his claim, but has also declared that such locators 'shall have the exclusive possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes

and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations.' This statute undoubtedly introduced an important modification of the common law rule. It gives to the proprietor of a vein a right unknown to the comon law—the right to pursue such vein beyond his own lines, outside of that particular segment of the earth embraced within the lines of his claim extended vertically downward; and it is therefore, to that extent, an enlargement of his common law right. But, on the other hand, inasmuch as the same right is granted to every locator under the statute, each holds his possession subject to the same right in others, and is therefore liable to have his land entered by an adjoining proprietor pursuing his vein in its course beyond his own side lines; and to this extent, therefore, his common law possession is abridged.

Two points cannot fail to be noticed in this connection: First, that this enlargement of the common law possessory right is incident only to a claim located in the manner provided by law; and second, that the exercise of such right operates to the abridgment of the possession of every tenement penetrated or intersected by a vein having its top or apex in a superior tenement.

Such I understand to be the effects of the statute. I am unable to see that in any other particular essential to this controversy the rights of possessors of mineral

lands differ from those of other lands. Says Justice Hallett, in the case of *Leadville Min. Co. vs. Fitzgerald,* 4 Morr. Min. 385: 'Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere.' And in the case of *Colorado Central vs. Equator Min. Co.,* the same learned Judge remarks: 'Generally, it may be said that a patent for a lode will convey all valuable deposits within the tract described, except such as may belong to lodes and veins which outcrop elsewhere, and come into the tract in their downward course. *Prima facie* the patentee must be the owner of all that lies within his lines. * * * Every owner by patent shall be sovereign in his own domain, and when he goes beyond it he shall recognize the equal rights of others to the same protection.' The United States Supreme Court, in *Forbes vs. Gracey,* 94 U. S. 767, says that the patentee 'obtains the government title to the entire land, soil, mineral, and all,' and declares that the only distinction between the patentee and the locator is in the ownership of the fee. See, also, *McCormick vs. Varnes,* 2 Utah, 362; *Wolfley vs. Lebanon Min. Co.,* 4 Colo. 114; *Pacific C. Min. & M. Co. vs. Spargo,* 8 Sawy. 645;

s. c. 10 Fed. Rep. 348. That actual possession is good and sufficient evidence of title, as against a mere intruder, is established by numerous well-considered cases. I cite a few only: *Grover vs. Hawley,* 5 Cal. 485; *English vs. Johnson,* 17 Cal. 108; *Crossman vs. Pendery,* 8 Fed. Rep. 693; *North Noonday Min. Co. vs. Orient Min. Co.,* (on motion for new trial) 6 Saw. 507; s. c. 11 Fed. Rep. 125; *Golden Fleece* case, 12 Nev. 321; *Burt vs. Panjaud,* 99 U. S. 180; *Campbell vs. Rankin, id.* 261; *Trenouth vs. San Francisco,* 100 U. S. 251; Rev. St. U. S. Sec. 910.

It would seem, therefore, that one holding a mining claim by mere possession, while on the one hand not receiving that enlarged right incident to a valid mining location, and on the other hand being subject to intrusion by the lawful proprietor of any vein which may be found in its course downward to penetrate or intersect his claim, holds his claim in other respects with and subject to the incidents of possession at common law; and may defend his possession of the surface, and of that segment of the earth included within his surface lines extended vertically downward, with all that it contains, against every one not claiming under superior title. A *fortiori,* therefore, is one holding the patent of the United States for a mining claim entitled to challenge the right of any intruder within the lines of his claim, and to require him to justify such intrusion by proprietorship of a vein having its top or apex in some other claim, and the pursuit of which on its downward course has brought him to the ground in controversy. Undoubtedly, were the plaintiffs seeking to enforce a

similar right, they would be compelled to prove what the defendant so urgently insisted upon his motion that they must prove, viz., all the incidents of a valid mining location under the laws regulating the same, and that the ore body in controversy was part of a vein of which, by virtue of such location, they had become proprietors; but, as we have already seen, such is not the position of the plaintiffs, while on the other hand it is precisely the position occupied by the defendants, and it is just this which renders the doctrine of many of the cases cited by the defendants, as for instance, *Stevens vs. Williams,* 1 McCrary, 480; *Zollars vs. Evans,* 2 McCrary, 39; s. c. 5 Fed. Rep. 172; *Van Zandt vs. Argentine Min. Co.,* 2 McCrary, 159; s. c. 8 Fed. Rep. 725; *Jupiter Min. Co. vs. Bodie Min. Co.,* 11 Fed. Rep. 669; see, also, *Stevens vs. Gill,* 1 Morr. Min. 581,—inapplicable to the case of the plaintiffs, while entirely pertinent to the case of the defendants."

*Iron Silver Min. Co. vs. Campbell,* 17 Colo. 267:

*Syllabus:*

"3. *Following Vein Beyond Side Lines—Burden of Proof.*—A patent gives a *prima facie* right to the patentees to the exclusive possession of the premises covered by the patent. When others rely upon a right to follow into the patented territory a vein, which they claim has its top or apex outside the premises covered by such patent, the burden of establishing such right rests upon them."

At page 275, Chief Justice Hayt, delivering the opinion, says:

"The plaintiffs by the introduction of their patent established a *prima facie* right to the possession of the premises in controversy, and we are unable to find any admission in the complaint sufficient to overcome such *prima facie* showing. Appellants, relying upon a claim of right to follow their vein into the territory included within the side lines of plaintiff's claim were properly held to have had the burden of proving such claim."

*Doe vs. Waterloo Mining Co.*, 54 Fed. Rep. 935:

*Syllabus:*

"1. *Mines and Mining—Patents—Right to Follow Dip.*

The patentee, and even the mere possessor, of a mining claim, under license from the government, has a right to all mineral lying vertically beneath the surface of his claim, subject only to the right of the lawful possessor of a neighboring claim having parallel end lines to follow any lode, the apex of which lies within his claim, on its dip within the limits of infinite planes vertically projected through such end lines. An unlawful possession has no such right to follow the dip. *Montana Co. vs. Clark*, 42 Fed. Rep. 626, disapproved. *Duggan vs. Davey*, (Dak.) 26 N. W. Rep. 887, approved. *Reynolds vs. Mining Co.*, 6 Sup. Ct. Rep. 601, 116 U. S. 687, distinguished."

Ross, District Judge, in his opinion, says, at page 937:

"Three questions have been presented, and ably and

elaborately argued by counsel, and upon one of which a large mass of testimony has been taken.

The first is presented by the defendant, and is to the effect that the certificates, which it is conceded are to be regarded, for the purposes of this case, with like force and effect as patents, held by the complainant, confer upon him no right to anything except the surface of the ground within the surface lines of the claims, and such veins, lodes or ledges as have their apex within such surface lines, and that the holder of such certificates has no cause of complaint against any one who enters and mines, even without any right in himself, under the surface of such lode claim, so long as he leaves the surface undisturbed, and does not interfere with any vein, lode or ledge having its apex within the surface lines of such claim or claims. To this I cannot assent. It is true it was so decided in *Montana Co. vs. Clark,* 42 Fed Rep. 626. But the opposite conclusion was reached in what I consider the better reasoned case of *Duggan vs. Davey,* (Dak.) 26 N. W. Rep. 887. It is entirely true that whoever takes a grant of a lode claim takes it subject to the provision of the statute reserving to locators of other mining claims the right to follow under its surface, for the purpose of extracting the ore therefrom, any vein, lode or ledge the top or apex of which lies within the surface lines of such other location. Rev. St., Sec. 2322. But until some one comes clothed with that reserved right, the holder of a government patent or certificate has, I think, the just and legal right to say, 'Hands off of any and everything within my surface lines extending vertically down-

ward.' There mere possessor of a mining claim under license from the government would have that right; a *fortiori,* the holder of a conveyance from the government. For it must be remembered that the extralateral right conferred by the statute is but an incident of a valid lode location. By the express language of the statute the right given is to 'the locators of all mining locations,' etc. Without such location the incidental extralateral right does not exist. It could not therefore exist in a stranger to the paramount source of title. While the real object of grants of the nature of those under consideration is the mineral, the statute makes provision, as stated in *Duggan vs. Davey,* for the disposition of 'lands valuable for mineral.' 'It is the 'lands' in which mineral deposits are found which are 'open to purchase.' It is 'land' claimed and located for valuable mineral deposits which is the subject of application for patent, and where patent of the United States issues it is for the 'land' at so much per acre.'

Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law. That seems to have been the view of Judge Hallett, in *Mining Co. vs. Fitzgerald,* 4 Morr. Min. Rep. 385, where he says:

'Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other terri-

tory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall show by preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere.'

This must also have been the opinion of the Supreme Court in *Iron Silver Mining Co. vs. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, otherwise the judgment in that case could not have been affirmed; for the defendant there offered to prove, among other things, that the vein, lode or ledge it admitted it had followed from the Stone claim into and under the surface of the Gilt Edge claim, and in and upon which it admitted it was mining, had its apex within the surface lines of the Stone claim, and—

'That the vein, lode or ledge on its dip, within vertical planes drawn downward through the end lines of the vein, lode or ledge, so existing and found within the Stone surface mining claim, and continued in their own direction,—namely, in the direction of the dip of the vein, lode or ledge, passed through, out of, and beyond the east vertical side line of the Stone surface claim and location into lands adjoining, to wit: into and under the said Gilt Edge surface claim.'

To which plaintiff objected on the ground that the proffered proof would not be a defense to the action, nor tend to establish a defense thereto, and that, by reason of the surface form or shape of the Stone claim,

its owners had no right, under the laws of the United States or otherwise, to follow the lode alleged to exist thereon in its downward course beyond the lines of the claim and into the plaintiff's claim, and that no part of the Gilt Edge claim, or the mineral or lode within it, was within vertical planes drawn downward through the end lines of the Stone claim, and continued indefinitely in their own direction. The lower court sustained the objection, and excluded the evidence offered, to which ruling the defendant excepted. The supreme court held that, in view of the facts of the case, the defendant did not have the extralateral right conferred by the statute, and affirmed the action of the lower court excluding the proffered proof. But if, as is contended here, any stranger could pursue such a vein, lode, or ledge upon the theory that it constituted no part of the claim under the surface of which it was found, defendant in that case would have been entitled, even though a stranger to the paramount source of title, to have pursued the vein, lode, or ledge, and the judgment of the lower court must have been reversed for refusing the proof that was offered.

* * * * * * * * * *

In *Cheesman vs. Shreve,* 37 Fed. Rep. 36, Judge Brewer, now an associate justice of the supereme court, held that, where parties enter beneath the surface within the side lines of a lode claim patented to others, they are *prima facie* trespassers, and must justify their entrance, or they will be restrained. I am of opinion, therefore, that the certificates of purchase issued by the government to the complainant make a *prima facie*

case for him, and that the burden is upon the defendant to justify its entry and mining beneath the surface of complainant's claims, by showing—first, such a location of the Silver King as under the law entitles it to follow any vein, lode, or ledge having its apex within its surface lines, outside its side lines extended vertically downward; and, second, that the acts of mining committed and threatened to be continued by it under the surface of complainant's claim were and are upon a vein, lode, or ledge having its apex within the surface lines of the Silver King claim, and which in its dip downward passes outside of the side lines of that claim, extended vertically downward, and into and beneath the surface of complainant's claim, and which lies between vertical planes drawn through the end lines of the Silver King, continued in their own direction."

*Morrison's Mining Rights,* Eleventh Edition, page 170:

"*Presumption—Burden of Proof.*

The presumption, where a miner is found beyond his side lines, is against him. He is *prima facie* a trespasser till he has shown that he gets there by following the lode on its dip from its apex within his lines. *Cheesman vs. Shreve,* 16 M. R. 79; *Blue Bird Co. vs. Murray,* 23 Pac. 1022; *Bell vs. Skillicorn,* 28 Pac. 768; *Cons. Wyoming Co. vs. Champion Co.,* 63 Fed. 540; *Iron S. Co. vs. Campbell,* 17 Colo. 267; *Dugan vs. Davey,* 4 Dak. 110; *Leadville Co. vs. Fitzgerald,* 4 M. R. 380; *Doe vs. Waterloo Co.,* 54 Fed. 935; *Maloney vs. King,* 64 Pac. 351."

*Barringer and Adams, Law and Mines and Mining,* Page 442:

"The presumption in the first place is that all minerals found within his boundary planes belong to the owner of the claim. And upon a stranger claiming the right to mine inside of these planes rests the burden of proving that he is mining upon the dip of a vein whose apex is outside of the claim, and within a claim belonging to him. That is, in order to establish his right and justify the apparent tresspass, he must prove that he is the legal possessor of the vein which he is following. If he fails to establish *both* of these points he is a trespasser."

*Empire State-Idaho Min. & D. Co. vs. Bunker Hill & S. Min. & C. Co.,* 114 Fed. 417:

At page 418, Ross, Circuit Judge, says:

"The ore bodies in controversy, and which were awarded to the defendant in error by the judgment of the court below, lie beneath the surface of the Likely, Skookum and Cuba claims. As these three claims are also, according to the findings, the property of the plaintiff in error, *prima facie* the ore bodies in question belonging to it. *Cheesman vs. Shreve,* (C. C.) 37 Fed. 36; *Mining Co. vs. Murray,* (Mont.) 23 Pac. 1022."

*Lindley on Mines* (2nd Ed.) Vol. II, Section 615, page 1110:

" * * * While an apex proprietor pursuing his vein on the dip underneath adjoining lands is called upon to overcome certain legal presumptions flowing from surface ownership, so far as the conditions within

his own boundaries are concerned he is entitled to such presumptions of fact as rationally flow from other facts satisfactorily established."

The portion here cited is that which ends with the words "surface ownership," and in a note to which the author has cited the following cases:

*Leadville M. Co. vs. Fitzgerald,* 4 Morr. Min. Rep. 380, Fed. Cas. No. 8, 158;

*Iron S. M. Co. vs. Campbell,* 17 Colo. 267, 29 Pac. 513;

*Cheesman vs. Shreve,* 37 Fed. 36;

*Cheesman vs. Hart,* 42 Fed. 98;

*Jones vs. Prospect Mt. T. Co.,* 21 Nev. 339; 31 Pac. 642;

*Bell vs. Skillicorn,* 6 N. Mex. 399; 28 Pac. 768;

*Wakeman vs. Norton,* 24 Colo. 192, 49 Pac. 283;

*Lincoln Lucky and Lee M. Co. vs. Hendry,* 9 N. Mex. 149, 50 Pac. 330;

*Parrot S. & C. Co. vs. Heinze,* 25 Mont. 139, 87 Am. St. Rep. 386; 64 Pac. 327;

*Maloney vs. King,* 25 Mont. 188, 64 Pac. 351;

*Calhoun G. M. Co. vs. Ajax G. M. Co.,* 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607;

*State vs. District Court,* 25 Mont. 572, 65 Pac. 1020;

*St. Louis M. & M. Co. vs. Montana M. Co.,* 113 Fed. 900;

*Empire State-Idaho M. and D. Co. vs. Bunker Hill and Sullivan M. Co.,* 114 Fed. 417.

See, for discussion of presumptions and burden of proof in cases of underground trespass,

*Lindley on Mines* (2d Ed.), Sec. 866.

THE DECISION OF AN INTERMEDIATE COURT IS NOT *res adjudicata.*

*Calhoun G. M. Co. vs. Ajax G. M. Co.*, 27 Colo. 9:

"It is contended by counsel for appellee that the ruling in *Branagan vs. Dulaney* and cases following it, is wrong and that this question should now be considered. In opposition to a reconsideration of the rights of cross lode claimants, as declared by those cases, it is urged that the doctrine of *stare decisis* applies, and even if wrong, should not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this State. We are aware of the gravity of reversing a long established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this Commonwealth have a right to presume that when a question has been once settled by this court that its decision is correct and that all may rely upon it. We understand, generally, that when a decision has established a settled rule of property, upon which rights are predicated (and especially those relating to real estate), the law will be adhered to by the court announcing it, and those bound to follow its adjudications, even if erroneous (*Black on Interpretation of Laws*, Sec. 152), but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon

the ground that a previous erroneous decision has been rendered on a given question. If it is wrong, it should not be continued, unless it has been so long the rule of action, and relied upon to such an extent, that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it. *Black on Interpretation of Laws, supra; Sutherland's Stat. Constr.*, sec. 316; *Boon vs. Bowers,* 30 Miss. 246."

*Davidson vs. La Plata County,* 26 Colo. 552:

"The decision of the court of appeals is not *res adjudicata.* It has been held by this court in the case of *Brown vs. Tourtelotte,* 24 Colo. 204, that the doctrine of the law of the case does not apply to decisions of the court of appeals in cases where their finaly determination may ultimately rest with the supreme court. This sufficiently disposes of the claim in that behalf made by the defendant in error."

*Brown vs. Tourtelotte,* 24 Colo. 204:

*Syllabus:*

"1. *Law of the Case.*

"A decision by the court of appeals in a case the final decision of which may ultimately rest with the supreme court does not constitute the law of the case, although it may not have been reviewable in the first instance upon appeal to or writ of error.

"2. *Same.*

"The doctrine that the law of the case as announced by an appellate court is conclusive in subsequent pro-

ceedings does not apply to the decisons of intermediate courts, but only to appellate tribunals which are also courts of the last resort."

WILFUL TRESPASS MUST BE PROVED; IT IS NOT PRESUMED FROM THE COMMISSION OF THE TRESPASS.

The Court in its charge instructed the jury that if it found from the evidence, under the Court's instructions, that the vein in question had its apex in territory belonging to the plaintiff, and the plaintiff had a right to follow it under the surface of the defendant, and the defendant had mined ore from it, then the trespass committed was presumed to be wilful, and that the burden was upon the defendant to prove that it was honest, or inadvertent in its character.

This instruction was given for the purpose of enabling the plaintiff to recover punitive or exemplary damages. Its effect was to charge that whenever a trespass was committed the presumption was an wilful trespass.

Our position is that where a trespass is alleged to be wilful, and this fact is used to enhance the damages, and to give to the plaintiff more than its loss,—something beyond compensation for the property taken, then the plaintiff must prove that the trespass was not only unlawful, but that the facts existed which entitled it by way of smart money, to these enhanced damages. This is but stating that when a plaintiff alleges a fact as the basis of a recovery and this fact is denied that it must prove it.

*Murray vs. Pannaci,* 130 Fed. 31:

"~~Any~~ In trespass to justify the imposition of exemplary or punitive damages, something more must be shown than the doing of an unlawful or injurious act. There must be evidence that the injury was inflicted maliciously or wantonly, or with circumstances of contumely and indignity, or at least with wrongful motive."

*Day vs. Woodworth,* 13 How. 363;
*Philadelphia etc. R. R. Co. vs. Quigley,* 21 How. 202;
*Milwaukee etc. R. R. Co. vs. Arms,* 91 U. S. 489-493.
*Fohrmann vs. Consolidated Traction Co.,* 63 N. J. L. 391.

"None of these things, we think, could be justly imputed to the defendant here under the evidence."

*Thomas vs. Southern,* 30 S. E. 343;
*Alabama vs. Arnold,* 4 So. 363;
*Hansley vs. Jamesville,* 32 L. R. A. 543, 117 N. C. 565;
*Craven vs. Bloomingdale,* 171 N. Y. 450;
*Kern vs. Warfield,* 60 Miss. 808.

"Again appellant failed to show any carelessness or recklessness in the cutting of the trees or any lack of reasonable precaution in endeavoring to ascertain the boundaries of appellees' land.

Therefore, even conceding the agency and authority of Farlow, appellee would only be liable for the actual value of the timber cut."

*Compton Al. & Co. vs. Marshall,* 29 S. W. 1058.
*3 Elliott on Evidence,* Section 2149:

"The burden rests upon the party who assails the faith of a transaction or conveyance to show that it was fraudulent by either direct or circumstantial evidence.

In the absence of evidence to the contrary, the law presumes that every man performs his business transactions in good faith and for honest purposes; and any one who assails the transactions or alleges that it was done in bad faith or for a dishonest and fraudulent purpose has the burden of showing the fraud or bad faith."

*R. R. Co. vs. Varnell,* 98 U. S. 479;
*Jones vs. Simpson,* 116 U. S. 609;
*Pruitt vs .Wilson,* 103 U. S. 22;
*Gulf etc. R. R. Co. vs. Johnson,* 54 Fed. 474;
*Wilson vs. Fuller,* 9 Kan. 365;
*Hatch vs. Bayley,* 12 Cushing, 27;
*Stewart vs. Thomas,* 15 Gray, 145;
*Boughman vs. Penn,* 31 Kan. 504;
*Elliott vs. Stoddark,* 98 Mass. 145;
*Walker vs. Collins,* 50 Fed. 737;
*Walker vs. Collins,* 59 Fed. 70.

## REPLY POINTS.

Defendant in Error stoutly asserts that the Court below was concluded, and the Plaintiff in Error absolutely bound by what it asserts was the decision of this Court, to wit: That the deed made by the Defendant in Error to the Plaintiff in Error did not convey and was not intended to convey all the mineral contained in

the compromise ground, and to support this contention cites the following extract from this Court's Opinion in 102 Fed. 430: "It is not to be supposed that the owners of the St. Louis claim intended by the compromise contract not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extra-lateral rights—rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient."

This quotation makes clear the fact that this Court in construing the contract back of the deed and in contdolling the deed by its construction of the contract went outside of deed and contract to what was claimed to be the relations of the parties to the matters in controversy, and reduced the grant of the deed and the scope of the contract so as not to give more to the Plaintiff in Error than the Court estimates would have been recovered by it had it been successful in its contentions. Insisting most strenuously on the position taken in the original Brief as to the doctrine of the "law of the case", as applied to this controversy, and also to the position of the Plaintiff in Error that the deed is complete in itself, and conveyed what is described therein to the extent and with all the incidents pertaining to a common law grant, and that the quoted words emphasize and make unmistakable the purpose

of the instrument, ~~conveyed~~ to the extent of all interest therein of every nature held by the Defendant in Error the premises described, and all mineral therein contained. We find in this quotation and the position of this Court, based thereon, perfect reason for reversing this cause and for modifying the original opinion to conform to the real facts now brought to the attention of this Court. There was in controversy between these litigants, not merely the compromise ground, but an extensive area and apex rights, which did not affect the compromise ground. There was a compromise and not a concession, by the St. Louis Company ~~and~~ to the Nine Hour People of all the ground in dispute. If the Nine Hour People had succeeded in their contentions, they would have obtained the compromise ground, the entire apex relied upon by the Defendant in Error and much additional ground and apex rights and a decision making the Nine Hour claim superior to the St. Louis claim and entitling the Nine Hour claim under the principles announced by this Court in the 104 Fed., to follow the vein upon its dip, wherever it possesses only a part of the width of the apex. No theory or doctrine of "the law of the case" prevents the parties, upon a new trial which is by the mandate unlimited in its character, from testing the sufficiency of the evidence introduced, and from adding to its own testimony at the new trial. In this trial there was introduced, and offered to be introduced ~~in~~ evidence to prove that the ground in controversy was greater in extent than the compromise ground; that it was first located as a part of the Nine Hour location, and then

improperly surveyed in by the St. Louis. Had these facts, now in the case and before the Court, been before this Court on the former hearing, it could not have construed the deed and contract as it did construe them, for the very foundation of that construction is established as having been non-existant. Whatever duty was upon the lower court to observe and follow the opinion of this Court on the former Writ of Error it cannot be claimed to extend to an application of it to facts entirely different from those made the basis of it by this Court.

In view of these facts the true significance of the words employed become apparent and should have their full and natural meaning, such as is required by the canon of construction which requires to be given to all words of contracts and conveyances their ordinary significance.

If extraneous matters should be considered to affect the meaning of a contract and deed, then all such facts should be considered. This the lower court refused to do and now for the first time this Court is given an opporunity to do so. The result of a consideration of these facts negatives the infernce of the Court on a partial presentation of the facts. There was nothing in the opinion of this Court on the former Writ of Error nor in the mandate, to the effect that the Defendant in Error should take judgment without introducing evidence, or that the new trial should be limited to a consideration of the former testimony and such is not the law when new trials are awarded, as in this case. The Defendant in Error for the sake of the advantage

which it hoped to secure through a new trial, granted because of the decision of Judge Knowles on the question of divided apex, took the new trial. The Supreme Court held in this case when before it, that there had not been a final decision in the cause, but a new trial generally. The case therefore stood at the new trial as all cases in which new trials are granted, with liberty to either party to strengthen its case by new testimony, and by attacks upon its opponent's testimony, as is so often done.

This Court has never passed upon, and the trial court in this case refused to pass upon the contention of the Plaintiff in Error that there had been an adjudication in the State Court, in Montana Company *vs.* St. Louis Co.—the Specific Performance case, of the right of the Plaintiff in Error, to a conveyance of the compromise ground, and of all minerals therein contained.

It is contended that all the court below could do under the decision of this Court on the former Writ of Error was to hold an inquest of damages. Had this been the determination of this Court, there would have remained a final judgment of the court below confirmed by this Court, and therefore reviewable by the Supreme Court of the United States. The Supreme Court of the United States expressly held that this position could not be maintained. In cases cited by Defendant in Error in which the inquiry under the mandate was limited, it will be found that the mandate directed something, and did not generally grant a new trial. This is notably true in

*Empire State Mining Company vs. Hanley,* 136 Fed. 99;

*Thompson vs. Maxwell,* 168 U. S. 451.

Each of these was a suit in equity. The decree of the lower court was modified and specific directions given for definite proceedings thereunder which only permitted specific and limited inquiries. In neither was a mandate such as was issued by this Court issued, nor a new trial awarded. In neither case were the parties required, or permitted, to introduce all the evidence upon which the judgment was to be based. The proceeding required was special in its nature, of narrow scope, employed for the purpose of enforcing the modified decree, or making special investigations to clearly define the purpose of it. In *Thompson vs. Maxwell,* 168 U. S. 451, Justice Brewer quotes from the mandate in the former appeal, the folloiwng: "Our conclusion is that the present decree must be reversed with costs, and that the cause be remanded to the court below with directions to allow the complainants ~~the~~ to amend ~~of~~ their bill, as they shall be advised, and with liberty to the defendants to answer any new matter introduced therein, and that all the ~~parties~~ proofs in the case shall stand as ~~parties~~ proofs upon any future hearing thereof with liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings."

## AREA IN CONFLICT IN THE ADVERSE SUIT.

That the area in conflict in the adverse claim suit of the Nine Hour owners was 1.98 acres is conclusively

shown by the Nine Hour patent (Record, page 154). The rules of the Interior Department governing the survey of mining claims for patent, are found set out at length in *Del Monte vs. Last Chance Mining Company,* 171 U. S. 55.

By reference to these rules or regulations it will be seen that it is prescribed—

"1. The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

2. The intersection of the lines of the survey with the lines of conflicting surveys should be noted in the field notes, and represented upon the plat.

* * * * * * * * * *

4. The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey substantially as follows:

It will be seen, first, that the Supreme Court of the United States takes judicial notice of these rules and regulations.

Second: That the plat found in the Nine Hour patent, which was introduced in evidence on the trial of this case without objection, conclusively shows that the area in conflict was as we claim it, 1.98 acres, and included therein is the small fraction thereof now known as the compromise ground.

In addition to this, of course, there is the testimony of Mr. Farmer, who measured the ground, the offered testimony of other witnesses who were acquainted with

the facts, and the maps introduced and used on the trial of the case, all showing this exact area.

It may be noted that the second interrogatory propounded in this case, which Mr. Justice Brewer says is sufficiently answered by the answer they have given to the first interrogatory, also arises in the case at bar.

## THE MOTION FOR A NEW TRIAL.

For some reason which we cannot divine, the counsel for the Defendant in Error have subjoined to their Brief, the memorandum opinion delivered by Judge Hunt in overruling our motion for a new trial. What object they could have in doing so we cannot fathom. It is certainly a new practice. The denial of a motion for a new trial cannot be assigned as error, and is not assigned as such in our record. It would therefore seem that this opinion could not serve any good purpose. The only reason that we can conceive which would induce them to attach this opinion to their Brief, and thus bring it before this Court, is in a measure to justify the enormous and outrageous verdict which the jury rendered in this case. Our motion for a new trial was grounded mainly upon the excessiveness of this verdict, and the evidence upon which it was based was incontrovertible and, we think, absolutely conclusive, and yet, although it was strenuously argued when our motion for a new trial was presented, it may be noted as something out of the usual course which courts ordinarily pursue, that in this opinion no reference whatever is made to the evidence upon which this part of the motion was based. Our motion was based upon what is shown by Exhibit "J" (Record, p. 133).

There was no conflict in the testimony that practically all of the ore mined out of the area in dispute was thus mined out and extracted between the months of November, 1898, and May, 1899. The further fact is proven beyond contradiction that all of the ore mined from this particular ground was worked in what is known as the 20 side of the 50 Stamp Mill of Plaintiff in Error.

This side was fitted properly for working ores, carrying considerable values in silver, which it is shown these ores carried, and there is indisputable testimony that all of it was worked through this portion of the mill save a very small part which was shipped directly to the smelter.

In addition to the ore coming out of the territory in dispute, ores from other parts of the mine were worked in this part of the mill between these periods—there was no separation of ores.

We had a deed for this property based on the judgment in the Specific Performance case, giving to us every pound of ore there was in that ground, and enjoining the Defendant in Error from asserting any claim, or right, or interest in the ground or any part of it. There was therefore no necessity of separating this ore from other ores that came from the mine and were of substantially the same character, to wit: high in silver values.

Turning now to Exhibit "J", the columns marked "s t" and headed "Tons in 20 side", shows that during this period of time 8563.2 tons of ore were worked

through this part of the mill. Going to column "V", headed "20 stamp bullion contents": The amount recovered for each month is given and the total aggegates $123,602.21. This total number of tons of ore mined from the disputed ground, and for which the Defendant in Error claims damages, amounted to a trifle over three thousand tons of the total 8563 tons worked, and yet they have damages against us for $195,-000. Is this not far more satisfatcory proof as to the actual value of the ore worked than the wild guess of an interested expert who bases his conclusions on the assay value of four choice picked samples taken from the rich ore lying along the north side of the Montana Company's apex shaft? Here was the amount which plaintiff realized out of the 3000 and odd tons claimed by the Defendant in Error, together with that recovered from five thousand and odd other tons of ore, and yet the total amount was as stated, $123,602.21. This verdict was manifestly so excessive as to more than justify the Court in the exercise of a sound discretion, in granting us a new trial.

CHAS. J. HUGHES JR.,
W. E. CULLEN,
Attorneys for Plaintiff in Error.

No 1240

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

THE MONTANA MINING COMPANY, LIMITED,

Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,

Defendant in Error.



**Reply to Supplemental Brief of Plaintiff in Error.**

M. S. GUNN,
JOHN B. CLAYBURG,
ARTHUR BROWN,
BACH & WIGHT,
Solicitors for Defendant in Error.

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

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Defendant in Error.

**Reply to Supplemental Brief of Plaintiff in Error.**

Assignments of Error XXIII, XXIV and XLIV are directed to Instructions 5, 8 and 11, respectively. It is claimed that by these instructions the court required of plaintiff in error a higher degree of proof respecting certain matters than the law demands.

Instruction 11 (Record, pp. 188-9), was not excepted to in the lower court. The objection now made to Instruction 8 is not the objection contained in the record. Before the jury retired the following exception was taken to Instruction 8: "It is contrary to law, in that no presumption whatever arises with reference to the course of the

discovery vein." (Record p. 205.) In the bill of exceptions other objections to this instruction are stated (Record p. 208), but they do not embrace the objection now made.

The fifth instruction reads as follows:

> "The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a prima facie case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this prima facie case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

It is said that by the use of the word "satisfaction" in this instruction the court required the plaintiff in error to furish a higher degree of proof than the law demands.

In the first place this instruction relates to the issue of title and is wholly immaterial, as this issue was not open for trial, as we have already shown. In the second place when this instruction is construed in connection with the other parts of the charge it will be seen that there is no ground for the criticism made. In the first part of Instruction 5 the court said: "The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages."

In the 14th instruction the court told the jury that the

"burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value."

Instruction 25 reads as follows:

> "When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the burden of proof, it does not preponderate in his favor, but that the evidence of each party is equal, in your judgment, it is your duty to find such issue against the party having the burden of proof, under these instructions. In determining the weight of the evidence you are not to consider alone the number of witnesses which have been sworn in behalf of either party, but to take into consideration the circumstances under which the evidence was given, the character and standing of the witnesses, their appearance upon the witness stand, and all the circumstances of their evidence, and after such consideration, you are to determine the weight and preponderance of the evidence upon each issue in favor of one or the other of the parties to this suit."

The language of the supreme court of the United States in the opinion in the case of Etna Life Ins. Co. v. Ward, 140 U. S. 76, is applicable to the objection made to Instruction 5. The court said:

> "The most important specification of error in the entire list is as follows: 'The court erred in charging the jury that 'the weight of the testimony must decidedly preponderate on the side of the defendant.' " Objection is particularly made to

> the use of the word 'decidedly' in this connection. The argument is, that the effect of that part of the charge was to direct the jury to return a verdict for the plaintiff, unless the evidence introduced by the defendant to establish its defense should satisfy them, beyond a reasonable doubt, that the defense had been made out. The phrase 'decidedly preponderate' is not technically exact, with respect to the weight and quantity of evidence necessary and proper to justify a verdict in civil cases. If, therefore, this clause of the charge stood isolated from any other part of it bearing upon the same subject matter, there would be serious objection to it. But we think the immediate context, as above quoted, shows that no such meaning can be fairly derived from it as claimed by the defendant. On the contrary, such meaning is excluded in the same sentence, where the jury were told that 'such evidence need not be so convincing as to make the effect beyond reasonable doubt;' and then immediately follows the clause objected to. We think the clause, when taken in connection with the whole tenor and effect of the entire charge, and especially in view of the immediate context, could not have misled the jury in the premises."

The plaintiff in error in its request to instruction No. XXIII (Record p. 219), uses the expression, "unless the plaintiff has *satisfied* you by a preponderance of the evidence." Again, in request No. XXVI (Record p. 220), we find this language: "This is so because the plaintiff must *satisfy* you by a preponderance of the evidence." It is quite evident that the objection now made to Instruction 5 is an after thought, and it is fair to presume that the use of the words "satisfy," "satisfied" and "satisfaction" in the charge was suggested by the plaintiff in error in the

requests for instructions which it made. The words "satisfy," "satisfied" and "satisfaction" are used eleven times throughout the charge. In five instances one or the other of these words is used in referring to the proof required of the defendant in error. (See Instructions 4, 11, 14, 17 and 31.) In Instruction 31 the words "find," "satisfied" and "believe" are all used in the same sense.

In the case of Walker v. Collins, decided by the circuit court of appeals for the Eighth circuit, 59 Fed. Rep. 70, p. 73, Circuit Judge Colville, in the opinion, said:

> "The defendants excepted generally to this charge, and in this court limit the exception to the last clause of the charge, which states that 'it devolves upon him who alleges fraud to show the same by satisfactory proof, i. e., proof to the satisfaction of the jury.' The objection to the charge is that the court should have told the jury that fraud may be established by a preponderance of the evidence, and not that it must be established by 'satisfactory proof, i. e., proof to the satisfaction of the jury.' The charge is taken almost literally from the opinion of the supreme court of the United States in the case of Jones v. Simpson, 116 U. S. 609, 615. In that case the court said: 'It devolves on him who alleges fraud to show the same by satisfactory proof.' * * *
>
> "In Bouvier's Law Dictionary (14th Ed.), the term 'satisfactory evidence' is defined to be 'that evidence which is sufficient to produce a belief that the thing is true; in other words it is credible evidence.' The Century Dictionary defines 'satisfactory evidence or sufficient evidence' to be 'such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced.' No better definition of these terms can be given, and it was in this

sense, presumably, that the jury understood them."

See also:

Treusch v. Ottenburg, 54 Fed. Rep. 867, 877;
Callan v. Hanson, 53 N. W. Rep. (Ia.) 282;
Peletier v. Railroad Co., 88 Wis. 521, 528;
Winston v. Burnell, 44 Kan. 367;
Carstens v. Earls, 26 Wash. 676, 690;
Kenyon v. City, 73 N. W. Rep. (Wis.) 314;
Sams, etc. Co. v. League, 54 Pac. Rep. (Colo.) 642;
Surber v. Mayfield, 60 N. E. Rep. (Ind.) 7.

In the case of Rogers v. Marshall, 1 Wall. 644, it is said:

"A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious and can not mislead the jury."

See also:

Baltimore & P. R. R. Co. v. Mackey, 157 U. S. 86.

Section 3103 of the Code of Civil Procedure of Montana, reads as follows:

"The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind."

Section 3105 provides:

"There are several degrees of evidence:
"1. Primary and secondary.
"2. Direct and indirect.

"3. *Prima facie,* partial, satisfactory, indispensible and conclusive."

Section 3112 provides:

"The evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence."

In *ex parte* Fiske, 113 U. S. 713, after quoting Section 914 of the Revised Statutes, the court said:

"In addition to this, it has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the states prevail in those courts."

See also:

Section 721, Rev. Stat. U. S.

In conclusion we respectfully submit:

1. That Instruction No. 5, relating to the issue of title, is immaterial.

2. It is apparent from the whole charge that the expression "showing to the satisfaction of the jury" has the same import as "showing by a preponderance of the evidence." Instructions 5, 14 and 25 together, the jury were clearly directed to be satisfied by a preponderance of the evidence.

3. The plaintiff in error, by its Requests XXIII and XXVI (Record pp. 219-221), having apparently suggested to the court the use of the words "satisfy," "satisfied" and "satisfaction," should not be heard to complain of the use thereof.

4. The instruction is clearly correct in view of the

definition of satisfactory evidence contained in Section 3112 of the Code of Civil Procedure of Montana.

5. The exception to Instruction 5 was not sufficiently specific to direct the attention of the court to the error now alleged, and for that reason the same should not be considered by this court.

In the opinion in the case of Merchants' Exchange Bank v. McGraw, decided by this court in 76 Fed. Rep. 930, it is said:

> "The national courts have uniformly and repeatedly declared that, in order to be of any avail, the exceptions to the charge of the court, and to other instructions given or refused, or any other rulings of the court, must be taken before the jury retires to deliberate upon their verdict. (Citing numerous cases.) A strict enforcement of this rule is absolutely essential to the proper and intelligent administration of justice. It often serves to correct inaccurate, inadvertent, or misleading expressions in the charge of the court. It affords an opportunity for explanations and qualifications which might otherwise be overlooked. It is not merely formal or technical. It was introduced and should be adhered to, for purposes of justice. *The exceptions, when taken, should be specific and direct, so as to call the attention of the court to the particular point which is claimed to be erroneous.* The practice of allowing counsel to take exceptions to the charge, or instructions, after the jury has retired, except in cases where the charge complained of was given in the absence of counsel, should be discontinued, because the allowance thereof simply incumbers the record, and creates unnecessary expense in the printing of the record and briefs of counsel upon points that will not be considered by the appellate court. The proper practice is to

> inform counsel that, if they desire to take any exceptions to the charge, it must be done before the jury retires."

In this connection attention is called to the fact that the lower court notified the attorneys for the respective parties that any exceptions to the charge should be taken before the jury retired. (Record pp. 199, 200.)

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Under the title "Wilful Trespass," Assignments of Error XXIII, XXIV, XXXVIII, XLIII, XLV, XLVI, and XLVIII, are referred to in the supplemental brief of plaintiff in error. Number XXIII relates to Instruction 5, XXIV to Instruction 8, XLIII to Instruction 9, XLIV to Instruction 14, XLVI to Instruction 15, and XLVIII to the action of the court in refusing to consider the exceptions to the charge presented in the bill of exceptions, and not made until after the trial. Assignment of Error No. XXXVIII is based on request of plaintiff in error No. XXIII.

Instructions 5 and 8 do not relate to the nature of the trespass. The same is true with reference to the request of the plaintiff in error No. XXIII and Instruction 9. There is no exception in the record to either Instructions 14 or 15.

An examination of the charge will disclose that the instructions relating to the nature of the trespass and stating the rules of law by which the jury were to determine whether the trespass was wilful or otherwise, are Instructions 11, 12, 13 and 14. There is no exception to either of these instructions contained in the record. We, there-

fore, submit that the question of the correctness of these instructions is not before this court. We further submit that these instructions are correct.

In the supplemental brief of plaintiff in error it is said that the presumption obtains that the owner of a mining claim is the owner of all that lies within its surface boundaries extended down vertically. Numerous authorities are cited in support of this proposition.

There is no exception to any part of the charge presenting any question regarding such presumption. But, however this may be, the presumption that the plaintiff in error is the owner of the ore in controversy can not obtain in this case, because it was admitted on the trial that the ore was taken from between the 520-foot and 133-foot planes out of a vein or lode which has its apex within the surface boundaries of the St. Louis claim. The court instructed the jury as follows:

> "It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis quartz lode mining claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence." (Record p. 185, instruction 7.)

There was no exception taken to this part of the charge.

———

In the supplemental brief of plaintiff in error authorities are cited in support of the statement that the doctrine of the law of the case does not apply to the decision of an intermediate court. This court has so often held that its decision on a former writ of error in the same case is the

law of the case that the question of the controlling effect of the former decisions of this court in the case at bar we do not consider open for discussion.

A number of authorities are cited to the effect that the burden of proof was upon the defendant in error to establish that the trespass was a wilful one. In the first place there is no exception in the record presenting any question regarding the burden of proof as to the nature of the trespass. In the second place, Instruction 14, to which no exception was taken, correctly states the law.

United States v. Homestake Min. Co., 117 Fed. Rep. 481, 486;

St. Clair v. Cash Gold Min. Co., 47 Pac. Rep. 467.

In this connection it should be remembered that it was an admitted fact in the case that the ore was taken from that part of the Drum Lummon vein which has its apex within the surface boundaries of the St. Louis claim.

Respectfully submitted,

M. S. GUNN,
JOHN B. CLAYBURG,
ARTHUR BROWN,
BACH & WIGHT,
Solicitors for Defendant in Error.

No. 1243

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

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HENRY WINTERS et al.,
*Appellants*,

*vs.*

THE UNITED STATES OF AMERICA,
*Appellee*.



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## TRANSCRIPT OF RECORD.

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**Upon Appeal from the United States Circuit Court for the District of Montana.**

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THE FILMER BROS. CO. PRINT, 424 SANSOME ST., S. F.

# INDEX.

*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANNAWAY, KIT LEONARD, CHRIS KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. EREAUX, HENRY CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY, (a Corporation), COOK'S IRRIGATION COMPANY, (a Corporation), and EMPIRE CATTLE COMPANY (a Corporation),

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

## Stipulation and Praecipe.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the following parts of the record submitted from the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, be printed, for consideration of this Court on appeal, to wit:

The bill of complaint.

Order to show cause.

Temporary restraining order.

Response of Matheson Ditch Company and accompanying affidavits.

Response of Henry Winter.

Response of Henry Corregan.

Response of Agnes Dowen.

Response of Andrew H. Reser et al.

Response of Empire Cattle Company and accompanying affidavit.

Response of Cook's Irrigation Company.

Response of Chris Kruse.

Affidavit of James N. Cook and John D. Blackstone.

Affidavit of N. A. Sharpless.

Testimony of W. R. Logan, C. T. Prall and Thomas M. Everett.

Opinion of the Court.

Final interlocutory order.

Petition for order allowing appeal, assignment of errors and order allowing appeal.

Bond on appeal.

Citation.

Certificate of clerk.

Omit title of court and cause in full on all papers, excepting the first page, and insert in place and stead thereof: "Title of Court, Title of Cause."

Omit all indorsements on papers, excepting: "Filed and entered (giving the date), George W. Sproule, Clerk," and insert Approval of Bond.

Omit all other papers.

It is further stipulated that the said cause shall be heard upon the assignment of errors set forth in the petition for an appeal.

Dated this 29th day of August, A. D. 1905.

E. C. DAY,
JAMES A. WALSH,
Solicitors for Plaintiffs in Error.

CARL RASCH,
United States District Attorney, Solicitor for Defendant in Error.

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

HENRY WINTERS et al.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

**Order for Printing Record.**

To Frank D. Monckton, Clerk of the Above-named Court.

Sir: You will please print the record in the foregoing entitled action, pursuant to the foregoing stipulation.

E. C. DAY,
JAMES A. WALSH,
Solicitors for Plaintiffs in Error.

[Endorsed]: Circuit Court of Appeals, Ninth Circuit. Henry Winters et al., Plaintiffs in Error, vs. The United States of America, Defendant in Error. Stipulation and Praecipe. Filed Sept. 2, 1905. F. D. Monckton, Clerk.

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*In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.*

IN EQUITY.

| | |
|---|---|
| THE UNITED STATES OF AMERICA, Complainant, vs. MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANNAWAY, KIT LEONARD, CHRIS KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. EREAUX, HENRY CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY, (a Corporation), COOK'S IRRIGATION COMPANY, (a Corporation), and EMPIRE CATTLE COMPANY (a Corporation), Defendants. | No. 747. |

**Caption.**

Be it remembered, that on the 26th day of June, A. D.

1905, the complainant filed its bill of complaint herein, which said bill of complaint is in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

## Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, in Equity.

The United States of America, your orator, by Carl Rasch, United States Attorney for the District of Montana, for and in its own behalf, and for and in behalf of its wards, the Indians residing upon the Fort Belknap Reservation in the State and District of Montana, files this bill of complaint against Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, ——— Corregan, (whose given or christian name is to your orator unknown), and W. M. Williams, residents of the State and District of Montana, the Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, defendants herein, and thereupon your orator complains and says:

First.

That the said defendant, Matheson Ditch Company, ever since the 13th day of April, A. D. 1899, has been, and at the time of the commission of the wrongs and

grievances hereinafter complained of, was, and said defendant is now a corporation organized and existing under and by virtue of the laws of the State of Montana, and is doing business in said State and District of Montana.

Second.

That the said defendant, Cook's Irrigation Company, ever since the 13th day of May, A. D. 1896 has been, and at the time of the commission of the wrongs and grievances hereinafter complained of, was, and said defendant is now a corporation organized and existing under and by virtue of the laws of the State of Montana, and is doing business in said State and District of Montana.

Third.

That the said defendant, Empire Cattle Company, ever since the 23d day of June, A. D. 1897, has been, and at the time of the commission of the wrongs and grievances hereinafter complained of was, and said defendant is now a corporation organized and existing under and by virtue of the laws of the State of Montana, and doing business in said State and District of Montana.

Fourth.

That heretofore, to wit, on or about the 1st day of May, A. D. 1888, a large tract of land situate within the northern part of the then Territory, now State of Montana, and then and there and thereafter, and at all times hereinafter mentioned, the property of your orator the said United States, was reserved and set apart by

the said United States as an Indian Reservation as and for the permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the State (then Territory) of Montana, designated and known as the Fort Belknap Indian Reservation, that the said Indian Reservation is now situated in the county of Choteau, in the State and District of Montana, and its boundaries were at the said time of the creation of said reservation fixed and defined as follows, to wit:

Beginning at a point in the middle of the main channel of Milk River, opposite the mouth of Snake Creek; thence due south to a point due west of the western extremity of the Little Rocky Mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk River opposite the mouth of Peoples Creek; thence up Milk River, in the middle of the main channel thereof, to the place of beginning.

That ever since the said 1st day of May, A. D. 1888, the said aforementioned and described tract of land has been, and the same is now an Indian Reservation, and the property of your orator subject to the occupancy of the said bands or tribes of Indians, and the same ever since the 1st day of May, A. D. 1888, has been and is now occupied and inhabited by the said bands or

tribes of Indians as and for their permanent home and abiding place.

Fifth.

That the said Fort Belknap Indian Reservation extends to the middle of the main channel of said Milk River, which said river is a non-navigable stream and water course, the said line in the middle of the main channel of said Milk River being the northern boundary line of said reservation. That large portions of the lands embraced within said reservation are well fitted and adapted for pasturage and the grazing and feeding thereon of stock and horses and cattle. That other large portions of said reservation are adapted for, and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of crops of grass, grain, and vegetables. That ever since the establishment of said Indian Reservation large herds of cattle, the property of your orator and of the Indians residing upon said reservation, and large numbers of horses, the property of said Indians, have been and are now feeding, pasturing and grazing upon said reservation and upon the lands within said reservation being and situate along and bordering upon said Milk River.

Sixth.

That such portions of the said Fort Belknap Indian Reservation as are adapted and fitted for farming and cultivation and the pursuits of agriculture thereon, as aforesaid, are of a dry and arid character, and in order to make the same productive, and for the purpose of

successfully raising thereon crops of grain, grass, and vegetables, require large quantities of water for the purpose of irrigating the same. That without water for the irrigation of said lands, the same would be and remain unproductive, and it would be impossible to successfully raise upon said lands crops of grain, grass, and vegetables. That heretofore, in the year 1889, your orator erected and constructed houses and buildings upon said reservation for the occupancy and residence of the United States Indian agent and the officers of your orator having the charge and superintendency of said reservation and the Indians residing thereon, generally known as the Fort Belknap Agency, and ever since the said year 1889, the said buildings and premises have been occupied by the United States Indian Agent and the officers and agents of your orator having charge and superintendency of said reservation. That the said agency depends entirely for its water supply for domestic, culinary and irrigation purposes upon the waters of the said Milk River, and that at all times, ever since the erection of said houses and buildings and the establishment of said agency, your orator has been obliged and is now obliged to depend for its water supply for said agency and for the purposes aforesaid upon the waters of said Milk River. That heretofore, and long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to wit, in the year 1889, your orator through its officers and agents at said Fort Belknap Agency, for the purpose of obtaining the requisite amount of water for

domestic, culinary and irrigating purposes for said agency appropriated, took and diverted from the channel of said Milk River, by means of pumps, pipes and waterways a large amount, to wit, a flow of one thousand miners inches of the waters of said Milk River, and by means of pumping the same out of the channel of said Milk River, and by ditches, pipes and waterways conducted the said waters of said river, so taken and diverted from said river as aforesaid, from the channel of said river to the said agency buildings and premises, and after so conducting the said waters to said agency buildings and premises, used the same for domestic, household and culinary purposes, and also for the irrigation of lands adjacent to, connected with and surrounding said agency buildings and premises, and by means of the use of said waters for irrigation purposes raised upon said premises adjacent to and connected with said agency crops of grain, grass and vegetables. That thereafter, but long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to wit, on the 5th day of July, A. D. 1898, your orator and the Indians residing upon said reservation, for the purpose of bringing and conducting water to and upon the lands of said Fort Belknap Indian Reservation with which to irrigate the same and raise thereon crops of grain, grass and vegetables, appropriated, took and diverted from the channel of said Milk River, by means of canals, ditches and waterways, additional large amounts of the waters of said Milk River, to wit, a flow of ten thousand miners

inches of the waters of said river, and by means of canals, ditches and waterways conducted the water of said river, so taken and diverted from the said river as aforesaid, from the channel of said river to and upon divers and extensive tracts of land upon said reservation aggregating in amount about thirty thousand acres of land, and after so conducting said waters to and upon said lands used the same for irrigation of said lands, and for domestic and other useful purposes, and by means thereof raised upon said lands crops of grain, grass and vegetables.

That ever since the said year 1889, and down to the time of the commission of the wrongs and grievances committed by the said defendants as hereinafter set out and complained of, your orator and its officers and agents residing at said agency, have constantly and uninterruptedly used and enjoyed the said waters of said Milk River so taken and diverted as aforesaid in the year 1889, at and upon said agency for domestic, culinary and household purposes, and for the irrigation of the lands and premises adjacent to and connected with said agency, and for raising upon said premises crops of grain, grass and vegetables, and ever since the said year 1898, and down to the time of the commission of the wrongs and grievances by the said defendants hereinafter set out and complained of, your orator and its officers and agents and the said Indians residing upon the said reservation as aforesaid, have continuously and uninterruptedly used and enjoyed the said waters of said Milk River so appropriated, taken and diverted as

aforesaid, on the 5th day of July, 1898, upon said lands embraced within said reservation for irrigating, domestic and other useful purposes, and by means of said waters so taken and diverted from said Milk River, and used by your orator and the said Indians residing thereon as aforesaid, have raised upon said lands crops of grain, grass and vegetables and carried on agricultural pursuits, and your orator has been enabled by means thereof to train, encourage and accustom large numbers of the Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement.

Seventh.

And your orator further showeth unto your Honors that large tracts of lands within said Fort Belknap Indian Reservation, being and situate along and contiguous to the channel of said Milk River, are used by your orator from year to year for the pasturing, feeding, raising, and grazing of livestock, principally horses and cattle, the property of your orator and said Indians residing upon said reservation. That in order to enable your orator and said Indians to successfully and properly pasture and feed said horses and cattle upon said lands, it is necessary and essential that the waters of said Milk River should be permitted to flow down the channel of said river, to supply and furnish said stock with drinking water. That unless the waters of said river are permitted to flow down the channel of said river, the said cattle and horses, so pasturing and feeding upon said lands, will be deprived of water neces-

sary for drinking purposes, and will render valueless for grazing, feeding and ranging purposes large tracts of lands within said reservation, situate along and contiguous to the channel of said Milk River.

Eighth.

And your orator further showeth unto your Honors that all of the waters heretofore so taken, appropriated and diverted from the channel of said Milk River as aforesaid, are essential and necessary for the use of your orator at the agency on said Fort Belknap Indian Reservation for household, domestic and culinary purposes, and for the purpose of irrigation of the tracts of land adjacent to and connected with said agency, and are essential and necessary for the proper irrigation and reclamation of the lands and premises upon said reservation for the cultivation of which said waters were appropriated, taken and diverted. That in order to enable your orator to maintain said agency, and in order to promote the civilization and improvement of the said bands and tribes of Indians upon said reservation and the encouragement of habits of industry and thrift among them, and in order to make all of the said lands within the said reservation which are adapted and suitable for farming and ranching and the pursuits of agriculture susceptible of cultivation and productive for the raising thereon of crops of grain, grass and vegetables, large quantities of water flowing in said Milk River will be required and necessary for the purpose of irrigation of the said lands within said

reservation and the reclamation of said lands. That for the purpose of subserving and accomplishing the ends and purposes for which said reservation was created, and in order to subserve the best interest of your orator and of the Indians residing upon said reservation, and the best interest of your orator in furthering and advancing the civilization and improvement of said Indians, and to encourage habits of industry and thrift among them, and to induce and enable said Indians to engage in and carry on the pursuits of agriculture and stock-raising as aforesaid, it is essential and necessary that all of the waters of said Milk River should be permitted to flow down the channel of said river, uninterruptedly and undiminished in quantity, and undeteriorated in quality.

Ninth.

And your orator further showeth unto your Honors, that notwithstanding the riparian and other rights of your orator and of the said Indians to the uninterrupted flow of all of the waters of said Milk River, as aforesaid, down the natural channel of said river, the said defendants, heretofore, to wit, in the year 1900, wrongfully and unlawfully, and without the license, consent or approval and against the wishes of your orator and of the said Indians, and without the license, consent or approval and against the wishes of the Secretary of the Interior of the said United States, and in utter disregard of the rights of your orator and the Indians residing upon the said Fort Belknap Reservation, en-

tered upon the said Milk River and its tributaries above the points of diversion of the said waters of said river by your orator and said Indians, as aforesaid, and above the places of use of said waters by your orator and said Indians, and built, erected, and constructed in and across the channel of said Milk River and its tributaries large and substantial dams and reservoirs and by means of said dams and reservoirs impeded, obstructed and prevented the waters of said Milk River and its tributaries from flowing down the natural channel of said river to the places of your orator's points of diversion and use of the said waters of the said river. That by means of said dams and reservoirs and by means of canals, ditches and water-ways, made and constructed wrongfully and unlawfully and without the license, consent, or approval of the Secretary of the Interior, over and through the public lands of your orator, by the said defendants, said defendants appropriated, took, and diverted all of the waters of the said Milk River and its tributaries out of and away from the channel of said river and its tributaries and by means of said canals, ditches, and water-ways, conducted and conveyed the same long distances away from the channel of said Milk River and its tributaries and away from the said Fort Belknap Indian Reservation. That by means of said dams and reservoirs and said canals, ditches and water-ways said defendants prevent any of the waters of said Milk River and its tributaries from flowing down the channel of said river to your orator's points of diversion and places of use

of said waters, and wholly deprived your orator and the Indians residing upon said reservation of the use of the waters of said river, all of which said acting and doings as aforesaid, of the said defendants was without the license, consent or approval of your orator, the said United States, and without the license, consent or approval of the Secretary of the Interior of the said United States.

Tenth.

And your orator further charges and says that ever since the said year 1900, the said defendants have been and are now, wrongfully and unlawfully and without right or authority, maintaining said dams and reservoirs, and have been and are now, by means of said canals, ditches, and water-ways, wrongfully and unlawfully, and without right or authority, appropriating, taking, and diverting all of the waters of said Milk River and its tributaries out of and away from the channel of said river, and ever since said year 1900, have been, and now are, wrongfully and unlawfully, and without right or authority, conducting and conveying the said waters of said river and its tributaries by means of said canals, ditches and water-ways, over and through the public lands of your orator long distances away from the channel of said river and from the said Indian Reservation, thereby impeding, obstructing, and preventing the waters of said river from flowing down the natural channel of said river to your orator's said points of diversion and places of use, and ever since the said year 1900, have been, and are now,

wrongfully and unlawfully, depriving your orator and the said Indians, residing upon the said Fort Belknap Indian Reservation, of the use of the said waters of said river and its tributaries for irrigating, stock-raising, domestic and all other useful purposes, all of which acting and doings of the said defendants was and is without the license, consent, or approval of your orator, and without the license, consent, or approval of the Secretary of the Interior, and in utter disregard and contempt of the rights of your orator in the premises.

Eleventh.

That the said defendants impede, obstruct, and prevent the flow of the waters of said Milk River down the channel of said river, as aforesaid, and take and divert the waters of said river and its tributaries from the natural channel of said river and its tributaries as aforesaid, and said defendants intend, and threaten to continue and will continue to do so, to the great and irreparable damage and injury of your orator, unless, the said defendants are restrained and enjoined from so doing by the order and decree of this Court. That your orator has no plain, speedy, and adequate remedy at law, and that unless the said defendants are restrained and enjoined from in any manner impeding, obstructing or preventing the waters of said Milk River from flowing down the channel of said river down to the places of your orator's use of said waters, your orator will suffer great and irreparable injury.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end therefore that

the said defendants may, if they can, show why your orator should not have the relief hereby prayed for, and make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, and direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived.

May it please the Court to grant to your orator a writ of injunction, issued out of and under the seal of this court, directed to the said defendants, Mose Anderson, Henry Winters, Louden Minough, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, ——— Corregan, W. M. Williams, Matheson Ditch Company, Cook's Irrigation Company, and Empire Cattle Company, perpetually and forever enjoining and restraining said defendants, and each of them, and their attorneys, officers, agents, servants, and employees, and all persons whomsoever, acting by, through, or under said defendants, or any or either of them, from in any manner constructing, erecting, keeping up, or maintaining any dams or reservoirs of any kind or character in or across the channel of said Milk River or its tributaries and from in any manner impeding, obstructing or preventing the waters of said Milk River or its tributaries from flowing down the channel of said river down to your orator's places of use, and

perpetually and forever enjoining and restraining said defendants, and each of them, their attorneys, agents, servants, and employees, and all persons acting by, through, or under them or any or either of them, from in any manner interfering with the flow of the waters of said Milk River or its tributaries and taking and conducting the same from and out of the channel of said river or its tributaries and that a temporary restraining order and injunction may issue, enjoining the said defendants and each of them, and all persons acting by, through, or under them, or any or either of them, from the commission of any of the acts herein complained of during the pendency of this suit.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena directed to the said defendants, Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, ——— Corregan, W. M. Williams, Matheson Ditch Company, Cook's Irrigation Company, and Empire Cattle Company, therein and thereby commanding them and each of them, on a day certain, to appear and answer unto this bill of complaint, but not under oath, an answer under oath being expressly waived, and then and there to abide and perform such order and decree as the Court shall make in the premises, and as shall

be agreeable to equity and good conscience, and in accordance with the rules and practice of this court.

CARL RASCH,

United States Attorney and of Counsel for Complainant.

United States of America,
District of Montana. } ss.

Carl Rasch, being first duly sworn, deposes and says: That he is the regularly appointed, qualified and acting United States Attorney in and for the District of Montana, that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

CARL RASCH.

Subscribed and sworn to before me this 26th day of June, A. D. 1905.

[Seal] GEO. W. SPROULE,

Clerk United States Circuit Court, District of Montana.

[Endorsed]: Filed and entered June 26, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th day of June, A. D. 1905, an order to show cause was duly issued herein, which said order to show cause is in words and figures as follows, to wit:

[Title of Court. Title of Cause.]

### Order to Show Cause.

On reading and filing the verified bill of complaint in said above-entitled cause, upon motion of Carl Rasch, the United States Attorney for the District of Montana, and Solicitor for Complainant:

It is hereby ordered that the said defendants, Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, —— Corregan, W. M. Williams, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and Empire Cattle Company, a corporation, show cause, if any they have, at the courtroom of this court, in the city of Helena, State and District of Montana, on the 17th day of July, A. D. 1905, at the hour of ten o'clock in the forenoon of said day, why a general injunction during the pendency of this suit, should not be issued against each of said defendants as prayed for in said complainant's bill of complaint, a true and correct copy of which bill of complaint is hereby directed to be served upon each of said defendants, together with a copy of this order; and that

in the meantime, and until the hearing of said order to show cause, a temporary injunction and restraining order be issued against said defendants according to the prayer of said bill of complaint on file herein.

Dated, this 26th day of June, A. D. 1905.

WILLIAM H. HUNT,
Judge.

**Marshal's Return.**

United States of America,
District of Montana. } ss.

I hereby certify that I received the within order to show cause on the 26th day of June, A. D. 1905, and personally served the same on the within-named Mose Anderson on June 30th, 1905, eleven miles west of Harlem; and on Henry Winters at Chinook, Montana, on June 30, 1905; on Louden Minugh, in Harlem, Montana, on June 30, 1905; on John W. Acker, 9 miles east of Chinook, on June 30, 1905; on Minnie Gannaway, 12 miles east of Harlem, Montana, on the 29th day of June, 1905; on Chris Kruse, 15 Miles west of Harlem, Montana, on the 30th day of June, 1905; on Agnes Downs, at Chinook, Montana, on the 30th day of June, 1905; on Thomas Downs, at Chinook, Montana, on the 30th day of June, 1905; on John Buckley, at Chinook, Montana, on June 30, 1905; on Bertha Reser, Lydia Reser, Ezra T. Reser and Andrew H. Reser, at Chinook, Montana, on the 30th day of June, A. D. 1905; on L. Ereaux, 25 miles east of Harlem, Montana, on July 1st, 1905; on ——— Corregan, at Chinook, Montana, on

June 30, 1905; on W. M. Williams, 5 miles east of Harlem, Montana, on June 29, 1905; on the Matheson Ditch Company, a corporation, by serving Matheson, one of the directors of said company, 6 miles east of Chinook, on the 30th day of June, A. D. 1905; on the Cook's Irrigation Company, a corporation, by serving James Cook, president of said company, 13 miles west of Harlem, Montana, on the 30th day of June, 1905; and on the Empire Cattle Co., a corporation, by serving A. J. Davidson, manager of said company, at Chinook, Montana, on the 30th day of June, A. D. 1905, by handling and leaving with each of them a true and correct copy thereof, together with a copy of the bill of complaint.

I further certify that I was unable to find the within-named Kit Leonard and Frank Rakita within the State and District of Montana.

Dated this 17th day of July, A. D. 1905.

C. F. LLOYD,
United States Marshal.

By Geo. E. Young,
Deputy.

[Endorsed]: Filed July 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th day of June, A. D. 1905, a temporary restraining order was duly issued herein, which said temporary restraining order is in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

**Temporary Restraining Order.**

The President of the United States of America, to Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannanway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, ——— Corregan, W. M. Williams, Matheson Ditch Company, a Corporation, Cook's Irrigation Company, a Corporation, and Empire Cattle Company, a Corporation, the Defendants in said Above-entitled Cause, and Their Agents, Attorneys, Servants and Employees, Greeting:

Whereas, in the above-entitled cause a motion for the issuance of a preliminary writ of injunction has been duly made, the hearing thereof being fixed for the 17th day of July, A. D. 1905, and it having been made to appear that there is danger of great and irreparable injury being caused to said complainant, the said United States of America, and its wards, the Indians residing upon the Fort Belknap Indian Reservation in the State and District of Montana, before the hearing of said application for the writ of injunction pendente lite, unless

said defendants are, pending such hearing, restrained and enjoined as herein set forth, and an order having been made granting complainant's application for such restraining order until and pending the hearing of said application for said preliminary writ of injunction during the pendency of this suit:

Now, therefore, take notice that you Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, ——— Corregan, W. M. Williams, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and Empire Cattle Company, a corporation, and each of you, and your and each of your agents, attorneys, servants and employees, and all persons acting by, through, or under you, or any or either of you, are hereby specially restrained and enjoined from taking or diverting the waters of Milk River or its tributaries from out of the channel of said Milk River or its tributaries, and from in any manner or by any means impeding, obstructing, or preventing the waters of said Milk River, or its tributaries, from flowing down the channel of said Milk River and its tributaries to the complainant's points of diversion and places of use of said waters upon the Fort Belknap Indian Reservation, and from in any manner or by any means interfering with or obstructing the free and uninterrupted use and enjoyment of the waters of said Milk River and its tributaries by the said complainant upon the Fort Belknap

Indian Reservation for culinary, domestic, and irrigation purposes until the hearing upon said application for a general writ of injunction and the further order of this Court in the premises.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, and the seal of said Circuit Court, this 26th day of June, in the year of our Lord one thousand nine hundred and five, and of our Independence the one hundred and twenty-ninth.

GEO. W. SPROULE,
Clerk.

**Marshal's Return.**

United States of America,
District of Montana. } ss.

I hereby certify that I received the within temporary restraining order on the 26th day of June, A. D. 1905, and personally served the same on the within named Mose Anderson on June 30, 1905, 11 miles west of Harlem; and on Henry Winters at Chinook, Montana, on June 30, 1905; on Louden Minugh, in Harlem, Montana, on June 30, 1905; on John W. Acker, 9 miles east of Chinook, on the 30th day of June, 1905; on Minnie Gannaway, 12 miles east of Harlem, Montana, on the 29th day of June, 1905; on Chris Kruse, 15 miles west of Harlem, Montana, on the 30th day of June, 1905; on Agnes Downs, at Chinook, Montana, on the 30th day of June, 1905; on Thomas Downs of Chinook, Montana, on the 30th day of June, 1905; on John Buckley, at Chinook, Montana, on June 30, 1905; on Bertha Reser, Lydia

Reser, Ezra T. Reser and Andrew H. Reser, at Chinook, Montana, on the 30th day of June, A. D. 1905; on L. Ereaux, 25 miles east of Harlem, Montana, on July 1, 1905, on ——— Corregan at Chinook, Montana, on June 30, 1905; on W. M. Williams, 5 miles east of Harlem, Montana, on June 29, 1905; on the Matheson Ditch Company, a corporation, by serving Matheson, one of the directors of said company, 6 miles east of Chinook, on the 30th day of June, 1905; on the Cook's Irrigation Company, a corporation, by serving James Cook, President of said company, 13 miles west of Harlem, Montana, on the 30th day of June, 1905; and on the Empire Cattle Company, a corporation, by serving A. J. Davidson, manager of said company, at Chinook, Montana, on the 30th day of June, 1905, by handing and leaving with each of them a true and correct copy thereof, together with a copy of the bill of complaint. I further certify that I was unable to find the within named Kit Leonard and Frank Rakita within the State and District of Montana.

Dated this 17th day of July, A. D. 1905.

C. F. LLOYD,
United States Marshal.
By Geo. E. Young,
Deputy.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant Cook's Irrigation Company filed its response herein, which said response is in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

### Response of Cook's Irrigation Company.

Now comes the defendant, Cook's Irrigation Company, and in response to the order to show cause why an injunction, during the pendency of this action, should not be issued herein, and reserving the right to demur, plead or answer the complaint herein, as it may be advised, respectfully shows to the Court that the injunction should not be issued, and the temporary restraining order issued herein should be dissolved, for the reasons following, to wit:

First. That the bill of complaint is verified only on information and belief, and no affidavit in support of the allegations has been filed or submitted.

Second. That it does not appear that the complainant is entitled to maintain an action for and in behalf of the Indians located upon the reservation mentioned in the complaint.

Third. It does not appear that the defendants are joint tort-feasors.

Fourth. It does not appear that the defendants did not appropriate and divert waters according to the laws of the United States, the laws of the State of Montana and decisions in its courts, and the customs of the country.

Fifth. It does not apear in the bill of complaint that the defendants are not riparian proprietors upon the said Milk River and its tributaries.

Sixth. And for other reasons appearing in the bill of complaint herein.

And in opposition to the granting of said injunction, and in support of the request to dissolve the temporary restraining order, defendants present the affidavit of James N. Cook and John D. Blackstone.

Wherefore, defendants ask that the application be denied, and moved that the temporary restraining order issued herein be dissolved.

WALSH & NEWMAN and
R. E. O' KEEFE,
Attorneys for Defendants.

[Endorsed]: Filed July 17, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant, Chris Kruse, filed his response herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

## Response of Chris Kruse.

Now comes the defendant, Chris Kruse, and in response to the order to show cause why an injunction, during the pendency of this action, should not be issued herein, and reserving the right to demur, plead or an-

swer the complaint herein, as he may be advised, respectfully shows to the Court, that the injunction should not be issued, and the temporary restraining order issued herein should be dissolved, for the reasons following, to wit:

First. That the bill of complaint is verified only on information and belief, and no affidavit in support of the allegations has been filed or submitted.

Second. That it does not appear that the complainant is entitled to maintain an action for and in behalf of the Indians located upon the reservation mentioned in the complaint.

Third. It does not appear that the defendants are joint tort-feasors.

Fourth. It does not appear that the defendants did not appropriate and divert waters according to the laws of the United States, the laws of the State of Montana, and decisions of its courts, and the customs of the country.

Fifth. It does not appear in the bill of complaint that the defendants are not riparian proprietors upon the said Milk River and its tributaries.

Sixth. And for other reasons appearing in the bill of complaint herein.

Seventh. That said bill of complaint does not state facts sufficient to show that the complainant is entitled to an injunction.

And in opposition to the granting of said injunction, and in support of the request to dissolve the temporary

restraining order, defendant presents the affidavits of James N. Cook and John D. Blackstone.

Wherefore, defendant asks that the application be denied, and moves that the temporary restraining order issued herein be dissolved.

WALSH & NEWMAN,
R. E. O' KEEFE,
Attorneys for Defendant.

[Endorsed]: Filed July 17, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant Empire Cattle Company filed its response herein, and affidavit of Cal. C. Shuler, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

## Response of Empire Cattle Company.

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana. In Equity.

Comes now the defendant the Empire Cattle Company, and in response to the order to show cause heretofore issued herein respectfully shows unto your Honors:

1. That this defendant is, and was at all the times mentioned in the bill of complaint since the 23d day of June, A. D. 1897, a corporation organized and existing under and by virtue of the laws of the State of Montana, with power and authority to acquire and own real estate and personal property.

2. That this defendant is the owner of and in possession and entitled to the possession of the north half and the southeast quarter of the southwest quarter of section thirty-three (33), township thirty-four (34) north, range nineteen (19) east; the east half of the northwest quarter; the west half of the northeast quarter; and the southeast quarter of the northeast quarter; the southeast quarter, the northeast quarter of the southwest quarter of section four (4); the northeast quarter; and the northeast quarter of the southeast quarter of section nine (9); the west half of the northwest quarter; the southwest quarter; the west half of the southeast quarter of section ten (10); the northwest quarter; the southwest quarter; the southwest quarter of the southeast quarter; and the west half of the northeast quarter of section fifteen (15); the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section twenty-two (22), all in township thirty-three (33) north of range nineteen (19) east. That the said lands are arid in character, and require a large amount of water for the purpose of irrigating same in order to successfully raise thereon crops of grain, grass and vegetables. That the title to a large portion of the said lands has been obtained from the United States Government under the laws thereof, relating to desert lands, and that the west fork of Milk River flows through the said lands and all of them.

3. That on the 13th day of January, 1899, the said Empire Cattle Company, together with W. S. Rainboldt, Josephine Rainbolt, J. S. M. Neill, Asbury Per-

kins and A. E. McFadden, appropriated 4,000 inches of the waters flowing in the West Fork of Milk River by posting at the point of diversion on said stream its notice of appropriation, stating therein the number of inches claimed, the purpose for which it was claimed, the place of intended use, and means of diversion and the size of the ditch in which it was intended to divert it, the date of appropriation and the names of the appropriators. That thereafter, within the time required by law, the said appropriators did duly cause to be filed in the office of the County Clerk and Recorder of Choteau County, Montana, in which said county the said stream was situated, a copy of the said notice of appropriation duly sworn to as required by law, which said notice was recorded in Book No. 2 of Water Rights, on page 532, records of Choteau County, Montana, to which records reference is hereby made, and a copy of which said notice so recorded is hereto attached and made a part hereof. That the said appropriators in the fall of the year 1898, acting together as an association known as the West Fork Ditch Company, constructed a dam on the West Fork of Milk River on the southeast quarter of the southwest quarter of section thirty-three (33) township thirty-four (34) North Range nineteen (19) east, and took out a ditch at that point, which said ditch was seven feet wide on the bottom and four feet deep, and constructed the said ditch so as to carry the same upon the lands of this defendant as hereinabove described. That at the time mentioned in the said notice of appropriation the waters of the said West Fork

of Milk River were by means of the said ditch and dam diverted from the said creek, and conducted through the said ditch to and upon the lands of this defendant as hereinabove set forth. That by means of the said water so diverted this defendant irrigated about seventy-five acres during the year 1899, and raised upon the said lands crops of hay and grain; that the said company has used the said waters during each and every year since the said year 1899 up to and including the year 1905; that during said period of time the said company has irrigated of said lands at least 800 acres. That this defendant company has by conveyance acquired all of the title of the said W. S. Rainbolt, Josephine Rainbolt, J. S. M. Neill, Asbury Perkins and A. E. McFadden in and to the said water right, and the right to use the waters of the said West Fork of Milk River, and the said ditch, and the defendant the Empire Cattle Company is now the owner of all the rights acquired by the said parties under and by virtue of the said appropriation. That by the use of the said waters upon the said lands the same, to the extent of at least 800 acres can be made to produce and have been made to produce during said period of time hereinabove mentioned, valuable crops of hay and grain, that without the said water for irrigation the said lands would be and remain unproductive and it would be impossible to successfully raise upon the same crops of grain, grass or vegetables.

EMPIRE CATTLE COMPANY,
By CARPENTER, DAY & CARPENTER,
Its Attorneys.

State of Montana,
County of Lewis & Clark. } ss.

A. J. Davidson, being first duly sworn, deposes and says: I am an officer of the Empire Cattle Company, the defendant corporation, to wit, its Secretary; I have read the foregoing response and know the contents thereof, and the same are true of my own knowledge.

A. J. DAVIDSON,

Subscribed and sworn to before me this 15th day of July, A. D. 1905.

[Seal] STEPHEN CARPENTER,
Notary Public in and for said County and State.

**Affidavit of Cal. C. Shuler.**

State of Montana,
County of Choteau. } ss.

Cal. C. Shuler, being first duly sworn, deposes and says: I reside near Chinook, Montana; I am and have been connected with the defendant, the Empire Cattle Company, in capacity of foreman; I have worked for the company since July 1st, 1898; I am familiar with the lands and ditches belonging to said company situated near Chinook, Montana, and have had charge of such lands and ditches since July first, 1898, and am familiar with the use made by said company of the waters flowing through the said ditches during all of said period of time. The Empire Cattle Company, together with one W. S. Rainbolt, composing what was

known as the West Fork Ditch Company, in the fall of 1898, constructed a dam in the West Fork of Milk River on the southeast quarter of the southwest quarter of section 33, township 34 north of range 19 east, which said dam was constructed of rock, brush and dirt. The said West Fork Ditch Company at the same time took out a ditch at the point in said river where the said dam was constructed and by means of said ditch and dam diverted the waters from said creek and conducted them to and upon the lands of the said Empire Cattle Company located in sections 4, 9 and 10 of township 33 north of range 19 east. The said company by means of the said water so diverted irrigated about 75 acres during the years 1899. During the year 1899 the company continued the construction of said ditch in a southeasterly direction through lands belonging to the Empire Cattle Company and W. S. Rainbolt in sections 10 and 15 of said township.

The said ditch was constructed without any unnecessary delay and by means of it the waters of said West Fork were diverted and used by the said Empire Cattle Company in irrigating its said lands and raising thereon crops of hay and grain. That said company has used the said waters during each and every year since the said year 1899 up to and including the year 1905. That during said period of time the said company has irrigated of said lands at least 800 acres. That the lands of the said company are arid in character and it is impossible to raise thereon crops of hay and grain without the use of the said water, but that

by the use thereof the said lands to the extent at least of 800 acres can be made to produce and have been made to produce during said period of time valuable crops of hay and grain.

That at the time of the filing of the complaint in this action the Empire Cattle Company was not using any of the waters in its ditches for the reason that there was not any water flowing in the said West Fork of Milk River at that time, and there had not been for a long period of time prior thereto, to wit, since the 18th day of June. That from the 18th day June until about the 4th day of July, 1905, there were no waters flowing in the said West Fork of Milk River at the head of the said company's ditch. That if the Indian Agency at Fort Belknap was unable to obtain any water from Milk River during said period of time it was not by reason of any act of the Empire Cattle Company, but because of the natural condition of said stream or the acts of some other person.

CAL. C. SHULER.

Subscribed and sworn to before me this 11th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,

Notary Public in and for Choteau County, Montana.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendants Bertha Reser, Lydia Reser, Ezra T. Reser and Andrew H. Reser, filed their response herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

### Response of Andrew H. Reser et al.

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, in Equity.

Come now the defendants Bertha Reser, Lydia Reser, Ezra T. Reser and Andrew H. Reser, and in response to the order to show cause heretofore entered herein why an injunction pendente lite shall not be issued, respectfully show unto your Honors, as follows, to wit:

First. That the defendants Bertha Reser and Lydia Reser are not now using nor have they or either of them been using any of the waters of the said Milk River or any of its tributaries during the period of time during which it is alleged in the complaint subsequent to the 24th day of April, 1905, the said waters have been diverted.

Second. That on or about the 12th day of February, 1900, the said Bertha Reser and Lydia Reser being then and there each of them citizens of the United States and otherwise qualified applied to enter under the laws of the United States relative to the acquisition of title to desert lands, three hundred and twenty acres of land each situate, lying and being in section 11, 12 and 13 of

township 34 north, range 18 east, principal meridian of Montana.

That the said lands so filed upon by the defendants were then and there arid and desert lands of the United States, and were not capable of being cultivated except by the use of water thereon. That to irrigate the said lands and make the same suitable for cultivation and productive in the raising of crops of grass, grain and vegetables, the said Bertha and Lydia Reser did, on the 26th day of January, 1900, appropriate 50 cubic feet per second of the waters of the West Fork of Milk River by posting a notice of appropriation in a conspicuous place at the point of intended diversion, which said notice stated therein the number of cubic feet per second claimed, the purpose for which it was claimed, the place of intended use, the means of diversion, with the size of the ditch to be used in diverting it, the date of the appropriation, and the names of the appropriators. That the said point of diversion was at a point on the east bank of the stream marked by a dam across it 22 feet high, located about 200 yards east of the frame house belonging to said appropriators about eleven miles northwest of Chinook, Montana. That thereafter, within the time required by law the said appropriators did cause a copy of the said notice of appropriation, duly sworn to, to be filed and recorded in the office of the county clerk and recorder of the county of Choteau, in which said county the lands herein above described were situated.

That during the year 1900, the said appropriators built a dam of dirt across the West Fork of Milk River, and constructed a levee for holding the said waters so appropriated, expending upon the said structure about the sum of $1800, but the said dam and levy were washed out during the rainy season by floods in the said river. During the year 1901 the appropriators built a flume across the river at the point where the said dam had been, and carried it in a northerly direction to Reser Creek, a tributary of said West Fork, and conducted the waters thus appropriated to and upon the said lands herein above described, and used the said water to the extent that there were any in the said West Fork of Milk River upon the said lands until the fall of 1904. That the said waters so appropriated were used for irrigating the said land, and by means thereof the said appropriators raised upon said lands during the said years crops of grain, grass and vegetables. That about the 21st day of September, 1903, the said defendants Bertha Reser and Lydia Reser surrendered their filing upon the said desert lands, and transferred their right to the use of the water so appropriated to the defendants herein, Andrew H. Reser and Ezra T. Reser, and one Clarence B. Reser. That upon said 21st day of September, 1903, the said Andrew H. Reser, being then and there a qualified citizen of the United States, applied to enter under the desert land laws of the United States as evidenced by desert land entry, Helena Land Office No. 1196, the E. ½, SW. ¼, section 12, NE. ¼, NW. ¼ and NW. ¼, NE. ¼, section 13, tp. 34 N., R. 18 E. Mont.

Meridian. That the said Ezra T. Reser, being then and there a qualified resident citizen of the United States, applied to enter under the desert land laws, as evidenced by desert land entry No. 1194, Helena Land Office, the lots 3 and 4, and the W. ½, SE. ¼, sec. 12, tp. 34 N., R. 18 E., Mont. Meridian. That at the same time the said Clarence B. Reser, being then and there a qualified citizen of the United States, applied to enter under the desert land laws as evidenced by desert land entry No. 1195, Helena Land Office, the NW. ¼, NE. ¼, the S. ½, NE. ¼, and N. 2, SE. ¼, section 11, the SW. ¼, NW. ¼, W. ½, SW. ¼, of section 12, Tp. 34 N., R. 18 E., Mont. Meridian. That on or about the 24th day of April, 1905, the said Andrew H. Reser, Clarence B. Reser and Ezra T. Reser changed the point of diversion of the waters so appropriated to a point a short distance further up the stream of the said West Fork of Milk River, and duly filed the notice of the said change in place of diversion in the office of the county clerk and recorder of Choteau county, and caused the same to be recorded in Book 4 of Water Right, on page 374, records of said county, to which record reference is hereby made for a more particular description of said appropriation. That the waters so appropriated were by these defendants Andrew H. Reser and Ezra T. Reser, together with their associate Clarence B. Reser, taken out and conducted by ditches theretofore constructed to and upon the said lands, and have been used for the purpose of irrigating crops of grain, grass and vegetables during the season of 1905, and the said appro-

priators have cultivated about two hundred and forty acres of the said land during said season. That about four hundred acres of the said lands so filed upon by the said appropriators are susceptible to cultivation by irrigation, and without the use of the said water the said lands and the whole thereof would be and remain unproductive, and it would be impossible to successfully raise upon the said lands crops of grain, grass or vegetables. That these defendants and their predecessors in interest have spent large sums of money, to wit, about the sum of ——— dollars in improving said lands and in constructing dams and ditches for the diversion of the said waters and conducting the same upon the said land. That it is the intention of these defendants in good faith to so continue to cultivate the said lands as to enable them to obtain title thereto from the United States under the laws thereof relating to the acquisition of title to desert lands. But that if the said defendants are restrained by order of this Court from using the said waters of the West Fork of Milk River it will be impossible for them to comply with the said laws, and their rights to the said land as herein above set forth will be forfeited.

Third. These defendants deny that they are diverting or appropriating any of the waters which, in the natural flow of the said Milk River would flow down to and past the lands described in the bill of complaint. That the amount of water so taken by these defendants does not exceed 300 inches and the point of diversion

is more than fifty miles distant from the point of use by the Indians as alleged in the complaint.

CARPENTER, DAY & CARPENTER,

Attorneys for Defendants Andrew H. Reser et al.

State of Montana,
Count of Choteau. } ss.

Andrew H. Reser and Ezra T. Reser, being each first duly sworn, each deposes and says: I am one of the defendants named in the foregoing response; I have heard read the said response and know the contents thereof, and the same is true of my own knowledge.

ANDREW H. RESER.

EZRA T. RESER.

Subscribed and sworn to before me this 11th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,

Notary Public.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant Agnes Dowen, filed her response herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

## Response of Agnes Dowen.

To the Honorable the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, in Equity.

Comes now the defendant Agnes Dowen and in response to the order to show cause heretofore entered herein, respectfully shows unto your Honors as follows, to wit:

First. That this defendant is not now using or has she ever been using any of the waters of said Milk River or any of its tributaries during the time mentioned in the said complaint, except for irrigating once about 20 inches in the spring of 1905.

Second. That she is a claimant to a tract of three hundred and twenty acres of unsurveyed public lands in Choteau county, Montana, described in and mentioned in receivers duplicate receipt No. 5866 issued from the U. S. Land Office, Helena, Montana, on July 16th, 1900, that in the year 1902 this defendant appropriated 12 cubic feet per second of the waters of the North Fork of Milk River for use upon the said lands in reclaiming the same from their arid condition, and commenced the construction of a dam and ditch for the

purpose of conducting the same to and upon the said lands; that the said dam was destroyed during the year 1903; was rebuilt by this defendant and was again destroyed in the year 1904, but has been re-built and the ditch completed so as to conduct the waters from said North Fork to and upon the said desert land; that it is the intention of this defendant in good faith to use the waters of North Fork upon the said land to the extent of ——— inches and to obtain title thereto from the United States under the laws thereof relating to the acquisition of title to desert lands; that about ——— acres of the said land so filed upon by the said appropriator is susceptible to cultivation by irrigation but without the use of the said water the said land and the whole thereof would be and remain unproductive and it would be impossible to successfully raise upon it crops of grain, grass, or vegetable. That if this defendant is restrained by order of this Court from using the said waters her rights to the said land as hereinabove set forth will be forfeited. That the amount of water so appropriated by this defendant will not in any manner affect the flow of the said Milk River past the lands described in the bill of complaint since the amount of water so to be taken by this defendant does not exceed 50 inches and the point of diversion is more than sixty miles distant from the point of use by the Indians as alleged in the complaint.

CARPENTER, DAY & CARPENTER,

Attorneys for Agnes Dowen.

State of Montana, }
County of Choteau. } ss.

Agnes Dowen, being first duly sworn, deposes and says: I am one of the defendants named in the foregoing response; I have heard read the said response and know the contents thereof and the same is true of my own knowledge.

AGNES DOWEN.

Subscribed and sworn to before me this 14th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,
Notary Public.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 17th day of July, A. D. 1905, the response of defendant Matheson Ditch Company, and the affidavits of defendants John Matheson, Thomas Dowen, John Prosser and John W. Acker, and of D. E. Martin and J. S. Roberts, were filed herein, being in words and figures, as follows, to wit:

[Title of Court, Title of Cause.]

## Response of Matheson Ditch Company.

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, in Equity.

Comes now the defendant Matheson Ditch Company and in response to the order to show cause heretofore issued herein respectfully shows unto your Honors:

First. That this defendant is a corporation organized and existing under the laws of the State of Montana for the purpose of constructing, maintaining and repairing a ditch taken out of the North Fork of Milk River known as the Matheson North Fork Ditch. That this defendant does not own or claim to own any of the waters flowing in the said ditch or in the said stream, nor has this defendant at any of the times mentioned in the bill of complaint diverted or claimed to divert any of the waters flowing in the said stream.

CARPENTER, DAY & CARPENTER,
Attorneys for Defendant Company.

State of Montana, }
County of Choteau. } ss.

John Prosser, being first duly sworn, deposes and says: I am an officer of the Matheson Ditch Company, the defendant named in the foregoing response, to wit, its president. I have read the foregoing response and know the contents thereof and the same is true to the best of my knowledge and belief.

JOHN PROSSER.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,
Notary Public in and for Choteau County, State of Montana.

**Affidavit of John Matheson.**

State of Montana, }
County of Choteau. } ss.

John Matheson, being first duly sworn, deposes and says: I reside at Chinook, Montana, and am a director in the Matheson Ditch Company one of the defendants in this action and was one of the organizers of said company. In the year 1890 one M. T. Ridout was occupying a portion of the lands hereinafter described as belonging to this affiant which were then unsurveyed public lands of the United States. On the 9th day of May, 1890, M. T. Ridout, together with one J. W. Clark, appropriated certain of the waters flowing in the North Fork of Milk River for the purpose of irrigating the lands then occupied by said Clark and Ridout, and filed their notice of appropriation in the office of the county clerk and recorder of Choteau County, Montana, in which the said lands were situated, a copy of which notice of appropriation is hereto attached and made a part hereof; that in the month of December, 1890, this affiant purchased from the said Ridout his right to the possession of the said land and to the use of the said water as evidenced by a quit claim deed then given to the said affiant, which said quitclaim deed was destroyed by a flood some years ago, before the same was recorded. That this affiant took possession of the said land and in May, 1891, commenced with the said Clark to construct a ditch, tapping the said North Fork of Milk River on its

south side some little distance east of the present ditch known as the Matheson Ditch, which said ditch was at that time eight feet wide by four feet deep. That the said ditch was completed during the year 1891 to the lands of this affiant. That in the winter of 1891 and 1892 affiant put in a dam in the said North Fork of Milk River about eleven feet high, and in April, 1892, the water by means of said dam and ditch was taken out from the said North Fork and used upon the lands of this affiant and said Clark for the purposes of irrigation and there was irrigated during that year about one-half section of the lands of this affiant and about one-quarter section of the lands belonging to Clark. The waters were continuously used through said ditch during the years 1892, 1893, 1894 and 1895, upon the lands belonging to and occupied by this affiant and the said John W. Clark and practically the entire area of said lands were irrigated and crops of hay, grain and vegetables were grown thereon during said years. That during the said years the dams in said river were washed out a number of times, and in order to obtain a better location this affiant and the said John W. Clark changed the point of diversion of the said waters to a point on the southwest bank of the said stream about fifteen rods east of the southeast corner of the northwest quarter of the northwest quarter of section 29, Tp. 33 N., range 20 east, being the point at which the present Matheson Ditch taps the said North Fork. That on the said 19th day of September, 1895, this affiant and John W. Clark associated with themselves one James Davis and appro-

priated about five thousand inches of the waters of the said North Fork by posting a notice as required by law at the point of the intended diversion and thereafter filing for record in the office of the county clerk and recorder of Choteau County, the county in which said stream is located a copy of said notice duly sworn to as required by law, a copy of which said notice so filed for record and recorded in book two of water rights on page 442, records of Choteau County, is hereto attached and made a part hereof. That during the year 1895 the said parties put in a dam at the said point of diversion as described in said notice, and constructed a ditch which at its head was twelve feet wide by eight feet deep, leading from the point of diversion about three-quarters of a mile in a southeasterly direction until it intersected the old ditch. The dam was located in the river about forty rods below the head of the ditch and was completed in the fall of 1895 and the head gate put in. The waters of the said North Fork were used continuously during the years 1896, 1897, 1898, through the said ditch upon the lands of this affiant hereinafter described and upon the lands of the said Clark which had been sold in 1896 to Henry Bosch and upon the lands of John Prosser, Thomas Dowen and John Acher, and H. M. Burrus, as set forth in the affidavits of said parties on file herein. In the spring of the year 1899 in order to properly maintain the said ditch and to defray the costs of repairs and maintenance this affiant and Thomas Dowen, Charles G. Acher and H. M. Burrus, each and all of whom were users of water through the said ditch, associated them-

selves together and formed a corporation known as the Matheson Ditch Company, a copy of the articles of incorporation of which are hereto attached and made a part hereof, the principal business of which said corporation was to maintain and keep in repair the said ditch hereinabove described to be known as the Matheson North Fork Ditch and Dam across said river. At the time of its organization the stock of said company was issued to the stockholders in the proportion in which each owned water running in the said ditch, and was divided as follows: John Matheson, 56 shares; H. M. Burrus, 15 shares; Thomas Dowen, 20 shares; John R. Prosser, 10 shares; Henry Bosch, 10 shares; John Acher, 5 shares, and the cost of maintaining and constructing the said ditch was borne by the said shareholders in the proportion which their respective shares bore to the whole issue outstanding. The said Matheson Ditch Company does not now and has not at any of the times mentioned in the complaint diverted or claimed to divert any of the waters of the said stream nor does the said ditch company own or claim to own any of the waters running in the said stream. The company owns and operates the said ditch for the benefit of its shareholders owning water rights entitling them to the use of the waters of the said North Fork in the proportion that their respective shares bear to each other and to the whole amount of shares of said company outstanding. That this affiant is the owner of about six hundred acres of land lying under the said ditch and during all the time since the organization of said company this

affiant has used through the said ditch the waters of the North Fork heretofore appropriated by him to the extent at least of three hundred inches each and every year during said period of time. And the other shareholders in the said company have used through the said ditch during each of said years, of waters of the said North Fork theretofore appropriated by them or their predecessors in interest to the extent of the shares held by them in the said company and have borne the expense of the maintenance of the said ditch in the proportion that the shares held bore to the number of shares outstanding.

JOHN MATHESON.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

**Affidavit of Thomas Dowen.**

State of Montana, }
County of Choteau. } ss.

Thomas Dowen, being first duly sworn, deposes and says: I am one of the defendants in this action; I reside near Chinook, Montana. I, together with the defendant, John Buckley, am and have been since the year 1895 the owner and in possession of the SE. 1/4 SE. 1/4 of section 26, E. 1/2 NE. 1/4, NW. 1/4 NE. 1/4 of section 35 and the N. 1/2 section 36, Tp. 33 N., R. 20 E. contain-

ing about 480 acres. We acquired our title to said lands by purchase from Alex Buckingham in the month of May, 1895; Buckingham had merely a squatter's right to the land and relinquished his right in favor of John Buckley and myself and we obtained title thereto from the United States under the Homestead Laws. Sometime during the year 1893 one W. E. Fisher had built a ditch, tapping the North Fork of Milk River on its southeast bank near its mouth and appropriated about six hundred and forty inches of the waters of said North Fork of Milk River. Alex Buckingham, on May the 12th. 1895, appropriated 300 inches of waters of the said North Fork to be used upon the lands hereinabove described and to be taken out of the said North Fork by means of the said Fisher ditch, the right to use which Buckingham had acquired from Fisher. Upon the purchase of said Buckingham's rights by affiant and his codefendant, John Buckley, they conducted about 300 inches of the waters of said North Fork through the said Fisher ditch to and upon the lands hereinabove described, and during the years 1896, 1897, 1898, they used the said waters through the said Fisher ditch upon the said lands, irrigating at least 100 acres thereof and growing crops of hay thereon. That in the year 1899 affiant purchased from one James Davis, an interest in a ditch which had theretofore been constructed by John Matheson, James Davis and John W. Clark, known as the Matheson Ditch, which tapped the North Fork of Milk River about three miles above the point of diversion by the Fisher Ditch and affiant and his codefendant,

John Buckley, acquired by said purchase the right to flow through the said Matheson ditch 200 inches of the waters of said North Fork of Milk River, and constructed a ditch tapping the Matheson ditch near the point where it crosses the line of the Great Northern Railroad Company and conducted the water from that point down to and upon the lands hereinabove described using the ditch known as the Fisher ditch for a portion of said lands and other ditches constructed by this affiant and Buckley for the rest of it. That in the month of April, 1899, this affiant, together with John Matheson, Charles G. Acher and H. M. Burrus organized and caused to be incorporated the Matheson Ditch Company for the purpose of maintaining the said Matheson Ditch and conducting the waters of the said North Fork belonging to this affiant and his associates to their said lands. This affiant and his codefendant, John Buckley, owning twenty shares of the capital stock of said company and being thereby entitled to use the said ditch to the extent of 200 inches. That during each and every year since and including 1899, up to and including the year 1905, this affiant and his codefendant, John Buckley, have used the waters of said North Fork through the said Matheson ditch to the extent of at least 200 inches and have irrigated about 300 acres of said land, and raised thereon crops of hay, grain and vegetables. That the said lands hereinabove described are arid in character and require large quantities of water for the purpose of irrigating the same in order to make them productive and successfully raise thereon crops of grain,

grass and vegetables, and that at least 200 inches of the waters of said North Fork are required for the irrigation of the lands heretofore cultivated by this affiant and his associate John Buckley.

Affiant further states that he and the said Buckley are not the absolute owner of the N. 1/2 of section 36 in said township, but that the said lands are a part of the public school lands of the State of Montana, and affiant and his associate hold and have held the possession and right to use the said land during the past nine years, by lease from the State of Montana.

THOMAS DOWEN.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,
Notary Public in and for Choteau County, State of Montana.

**Affidavit of John Prosser.**

State of Montana, }
County of Choteau. } ss.

John Prosser, being first duly sworn, deposes and says: I am near Chinook, Montana; I, together with Celia A. Gelder, am the owner of and in possession of the N. $\frac{1}{2}$, NW. $\frac{1}{4}$ and the SW. NW. $\frac{1}{4}$, section 35, Tp. 33 N., R. 20 E. In the year 1895 I purchased from James Davis by bill of sale, the right to use 200 inches of the waters of North Fork of Milk River through a ditch then being constructed by Davis, together with Clark

and Matheson, which is now known as the Matheson Ditch. In the fall of 1895 I assisted in the construction of the Matheson Ditch doing the amount of represented by my interest in the ditch as compared with the interests of the other owners. In the spring of 1896 I constructed a ditch running from the Matheson Ditch to and upon the land herein above described and used the waters of North Fork of Milk River through the said ditches upon the said land to at least the extent of 50 inches. That during the years 1896, 1897 and 1898, the waters of said North Fork were used upon said lands through the said ditches, the amount used being gradually increased each year. That in the spring of 1899 upon the organization of the Matheson Ditch Company, this affiant by reason of his ownership in said ditch and water right by purchase from said Davis became the owner of ten shares of the capital stock of the said ditch company representing the right to use 100 inches of the waters of the said North Fork through the said Matheson Ditch. That affiant in the meanwhile had sold to H. M. Burrus the right to use the remaining 100 inches of the waters so purchased by him from the said Davis and there was issued to said Burrus ten shares of the capital stock of said ditch company. That the waters of said North Fork of Milk River have been used by this affiant and Celia A. Gelder upon the lands herein above described during each and every year from said year 1899 up to and including the year 1905 to the extent of at least one hundred inches and affiant has contributed to the cost of maintenance of said ditch in the

proportion that his said shares bear to the rest of the capital stock of said company. That during each of the said years affiant and his co-owner have grown upon the said lands crops of hay, grain and vegegetables, and has cultivated the same to the extent of about one hundred and twenty acres up to the present time. That the said lands are arid in character and require large quantities of water in order to make them productive and in order to successfully raise thereon crops of grain, grass and vegetables. That at least 120 acres of said land is capable of cultivation by the use of water for irrigation and that at least one hundred inches of the waters of said North Fork are required for the proper irrigation of said land and this affiant and his associate Celia A. Gelder, have used and still are using that amount of said waters.

JOHN PROSSER.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

**Affidavit of John W. Acher.**

State of Montana, } ss.
County of Choteau. }

John W. Acher, being first duly sworn, deposes and says: I am one of the defendants in this action; I reside, near Chinook, Montana. In the year 1893, one Fred

Davis was the owner, in possession of and entitled to the possession of the NE. ¼ of section 31, Tp. 33 N., R. 21 E., Mont. Mer. That said Davis assisted in the construction of a ditch tapping the North Fork of Milk River by one W. E. Fisher and acquired by purchase from said Fisher the right to use through said ditch 200 inches of the said waters as represented by shares of stock in the Fisher Ditch Company, which said waters had theretofore been appropriated by said W. E. Fisher by means of the said ditch as represented by notice of appropriation filed on the 28th day of June, 1893, in the office of the County Clerk and Recorder of Choteau County, Montana. That by various and sundry conveyances this affiant has become the owner of the said NE. ¼ of section 31, together with the right to use the said 200 inches of water as represented by said certificate of shares in the said Fisher Ditch Company. That in the year 1896 this affiant who was then a qualified citizen of the United States took possession under the homestead laws of the United States the S. ½, NE. and the N. ½ of the SE. ¼ of section 32, Tp. 33 N. of R. 21 E., Mont. Mer., and has since acquired the full title to said land by patent from the United States. That on or about the said year 1896 this affiant purchased from one John Matheson the right to use 50 inches of water of the North Fork of Milk River appropriated and diverted by the said Matheson and others through the ditch known as the Matheson Ditch, which said right is represented by a certificate for five shares of stock in the Matheson Ditch Company issued to Acher Brothers but

which is in reality the property of this affiant. That on or about the 4th day of January, 1901, this affiant, who was then and there a qualified citizen of the United States applied to enter under the Desert Land Laws of the United States the S. ½ of the NW. ¼, the SW. ¼ of the NE. ¼ and the NW. ¼ of the SW. ¼ of section 33, Tp. 33 N. of R. 21 E., and this affiant is now in possession of the same claiming the right to occupy the same under the said Desert Land Laws. That the said Davis and the predecessors in interest of the affiant during each and every year from the year 1893 down to the year 1901 when the claim was acquired by this affiant, used the waters of the said North Fork of Milk River through the said Fisher and Matheson Ditches to at least the extent of 200 inches and that this affiant from the year 1896 up to the year 1901 has used the said 50 inches of water so purhased from the said John Matheson through the said Matheson Ditch upon the lands belonging to this affiant and that since the said year 1901, this affiant has used the said waters through the said Matheson and Fisher ditches upon his said land to the extent of at least 200 inches. That there has been cultivated upon the said section 31 and 32 and 33 at least 280 acres of land and that that amount is susceptible to cultivation by the use of water thereon and the use of said water is necessary for the successful growing of crops of hay, grain and vegetables. That during the period of time the said land has been occupied by this affiant he has successfully grown from the said land by the use of the said waters valuable crops of hay, grain and vegetables and

at the present time there are about 280 acres of the said lands which have been irrigated by this affiant.

JOHN W. ACHER.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,
Notary Public in and for Choteau County, State of Montana.

**Affidavit of D. E. Martin.**

State of Montana, }
County of Choteau. } ss.

D. E. Martin, being first duly sworn, deposes and says: I am a farmer by occupation; I reside about three and a quarter miles east of Chinook, Montana, and have resided there since 1891; I have known Mr. John Matheson since the year 1890, in the year 1890 Mr. Matheson purchased a tract of land in section 28, Tp. 33 N. of R. 20 E., Mont. Mer., from one M. T. Ridout and others and moved upon the land where he now lives and where he has lived during all these years since that date, in the spring of the year 1891, Mr. Matheson together with John Clark took out the waters of the North Fork of Milk River by means of a dam located on section 28 and a ditch taken out from the south side of the said North Fork and completed the ditch to and upon the land of the said Matheson during the year of 1891. He used the waters through the said ditch upon a considerable portion of his land during the years 1892, 1893, 1894 and

1895. And in the year of 1895 he, together with one Clark and Davis, constructed a new ditch extending from the southwest bank of the said North Fork to and upon his land and he together with others has used the waters of said North Fork of Milk River during each and every year since the said year 1895, and up to and including the year 1905.

D. E. MARTIN.

Subscribed and sworn to before me this 11th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

**Affidavit of J. S. Roberts.**

State of Montana, }
County of Choteau. } ss.

J. S. Roberts, being first duly sworn, deposes and says: I am a farmer by occupation; I reside about six miles east of Chinook, Montana, and have resided there about five years; I have known Mr. John Matheson since the spring of the year 1891. At that time he was living on section 28, Tp. 33 N. of R. 20 E., Mont. Mer., where he now lives. During that year he together with one John Clark built a dam on said section 28 in the North Fork of Milk River and constructed a ditch extending from the south side of the said North Fork to and upon the land of the said Matheson, and by means of said dam and ditch took out the waters of the said North

Fork and conducted them upon his said land. He used the water through the said ditch upon a large part of his land during the years 1892, 1893, 1894, 1895, using the water upon between two and three hundred acres of land. In the year 1895 he and Clark together with one Davis constructed a ditch extending from the southwest bank of the said North Fork at a different point of diversion which is a short distance up the stream and connecting with his old ditch. Through this latter ditch he and others have used the waters of said North Fork, each and every year since the year 1895. Among others who have used water through that ditch since 1895 were Thomas Dowen, H. M. Burrus, John Prosser, Henry Bosch, Acher Brothers, Charles Christiansen and John Acher and Sharpless Brothers. I myself have used water through there for about five years claiming title under Mr. Matheson.

I also visited the Belknap Agency on the sixth day of July, 1905, in company with John Matheson, Junior. At that time there was sufficient water in the river to fill the river above the dam to the top of the dam. The intake of the pumping station was 18 inches under the surface of the water. The Agency uses the water at that point for irrigating about four acres of land as a garden and for supplying the Indian School for domestic purposes.

At the same time I also visited the dam of the New Harlem Irrigation Company, which is located on Milk River below the ditches of the defendants in this action and above the ditches of the Indians. At that time

none of the defendants were using any water from the Milk River or any of its tributaries. The ditches of the New Harlem Irrigation Company were running full and were taking all the waters in the stream except about 150 inches. There was but a very small flow of water over the dam of the Harlem Company. There seemed to be a small seepage flow from the dam.

J. S. ROBERTS.

Subscribed and sworn to before me this 11th day of July, 1905.

[Seal] D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

[Endorsed]: Filed and Entered July 17, 1905, Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant Henry Corregan filed his response herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

### Response of Henry Corregan,

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit in and for the District of Montana, in Equity.

Comes now the defendant Henry Corregan and in response to the order to show cause heretofore entered herein respectfully shows unto your Honors as follows, to wit:

First. That this defendant is now and has been ever since the 26th day of September, 1901, in the possession of the NW. ¼ of the NW. ¼, the S. ½, NW. ¼ and the NE. ¼, SW. ¼, NW. ¼, SE. ¼ and S. ½, SE. ¼ of section 6, and the NE. ¼, NE. ¼ of section 7, Tp. 36 N., R. 18 E., Mont. Mer., of the unsurveyed public lands of the United States claiming the right to occupy the same under and by virtue of desert land entry No. 6986, Helena, Montana, Land Office.

Second. That for the purpose of reclaiming the said lands the defendant with one Sarah Corregan, did on the 12th day of October, 1901, appropriate 20 cubic feet per second of the waters of the North Fork of Milk River, by posting a notice of appropriation in a conspicuous place at the point of diversion, stating therein the number of inches claimed, purpose for which it was claimed, the place of intended use, the means of diversion with the size of the ditch, the date of appropriation and the names of the appropriators. That within the time required by law this defendant filed for record in the office of the county clerk and recorder of Choteau County, in which county said stream was situated a copy of the said notice of appropriation duly sworn to according to law, a copy of which said notice is hereto attached and made a part hereof.

Third. That immediately thereafter this defendant commenced the construction of said ditch and completed the same with reasonable diligence and during the year 1902 constructed about 21/4 miles of said ditch and diverted the waters from said stream and conducted

them to and upon the lands of this defendant herein above described to at least the extent of one hundred inches. That during each of the years 1902, 1903, 1904 and 1905, this defendant has used the said waters to the extent of 100 inches upon his said lands and has grown thereon valuable crops of hay and grain; that it is his intention in good faith to use the said waters upon the said lands and to obtain title thereto from the United States under the laws thereof relating to desert land. That if this defendant is restrained by order of this Court from using said waters his right to the said land as herein above set forth will be forfeited. That the amount of water so used by this defendant does not in any manner affect the flow of the said Milk River past the lands described in the bill of complaint since the amount of water so taken by this defendant does not exceed 100 inches, and the point of diversion is more than ninety miles distant from the point of use by the Indians as alleged in the bill of complaint.

CARPENTER, DAY & CARPENTER,
Attorneys for Henry Corregan.

State of Montana,
County of Choteau. } ss.

Henry Corregan, being first duly sworn, deposes and says: I am the defendant named in the foregoing response; I have heard read the said response and know the contents thereof, and the same is true of my own knowledge.

HENRY CORREGAN.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant Henry Winter, filed his response herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

## Response of Henry Winter.

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, in Equity.

Comes now the defendant Henry Winter, and respectfully shows unto your Honors that on or about the 18th day of March, 1896, one Perry E. Wyncoop, was and had been for a long time prior thereto the owner and in possession of the N. ½ of section 5 in Tp. 32, N. of R. 21 E., Mont. Mer., and that one Julia H. Wyncoop was and had been for a long time prior thereto the owner of the SW. ¼ of the SE. ¼ of section 31, and the S. ½ of the SW. ¼ of section 32 in Tp. 33 N., of R. 21 E., Mont. Mer. That on or about said date the said Perry E. Wyncoop did appropriate 320 inches of the waters of Milk River, and the said Julia H. Wyncoop did then and there appropriate 160 inches of the waters of Milk

River by posting a notice of appropriation at the point of intended diversion as required by law, which said notice stated the number of inches claimed, the purpose for which they were claimed, the place of intended use, the means of diversion with the size of the ditch, the date of the appropriation, and the names of the appropriators. That thereafter within the time required by law the said Perry E. Wyncoop and Julia H. Wyncoop did file for record in the office of the county clerk and recorder of Choteau County, in which said county the said water rights were located a copy of the said notice of appropriation duly sworn to as required by law, a copy of which said notice is hereto attached and made a part hereof. That thereafter during said year 1896, the said Perry E. Wyncoop and Julia H. Wyncoop did, by means of the said Paradise Ditch, divert the waters from the said Milk River, and conduct the same to and upon the above-described land, and used the same thereon for the purposes of irrigating the said land and growing thereof crops of hay and grain.

That on or about the 20th day of September, 1896, the said Perry E. Wyncoop and Julia H. Wyncoop, by deed of conveyance duly executed and acknowledged, did convey the said land and water rights to this defendant, who continued so to divert the said waters through the said Paradise Ditch until the year 1900. That on or about the 10th day of October, 1900, this defendant, together with one Moses Anderson, changed the point of diversion of the said water to a point on the

right bank of the said Milk River about eighty rods in a southwesterly direction from the SE. corner of section 36 in said township 33 N. of R. 19 E., and by means of a ditch 10 feet wide by two feet deep did divert from said Milk River about 100 cubic feet per second of the waters thereof. That since the year 1898 the defendant has also been the owner and in possession of the S. ½, NW. ¼, and lots 2 and 3 of section 4, and lot 1 of section 5, in Tp. 32, N. of R. 21 E. That during each of the said years since the year 1900 the defendant has diverted the waters of the said Milk River through the said ditch last herein above mentioned and conducted them to and upon all of the lands herein above described belonging to this defendant, and has irrigated the same to the extent of about six hundred acres, and has grown thereon each year since the year 1896 valuable crops of hay and grain. That all of the said lands are arid in character, and in order to make the same productive and to successfully raise thereon crops of grain, grass and vegetables, a large amount of water is necessary, to wit, at least 480 inches. That without the use of the said waters on said lands, the same would be and remain unproductive, and it would be impossible to successfully raise thereon crops of grain, grass and vegetables. That at the time of changing the said point of diversion of the said waters this defendant, together with one Mose Anderson, did duly file for record in the office of the county clerk and recorder of said county of Choteau, in which county the said stream is situated, his notice of appropriation of said waters, duly

sworn to, a copy of which is hereto attached and made a part hereof.

CARPENTER, DAY & CARPENTER,
Attorneys for Henry Winter.

State of Montana,
County of Choteau. } ss.

Henry Winter, being first duly sworn, deposes and says: I am the defendant named in the foregoing response; I have read the same and know the contents thereof and the facts therein stated are true of my own knowledge.

HENRY WINTER.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,
Notary Public in and for Choteau County, State of Montana.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the affidavits of James N. Cook and John D. Blackstone were filed herein, said affidavits being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

**Affidavit of James N. Cook and John D. Blackstone.**

State of Montana,
County of Lewis and Clarke. } ss.

James N. Cook, being duly sworn, says: That he is the president of Cook's Irrigation Company, one of the defendants in the foregoing entitled action, and that this affidavit is made for and in its behalf, and in response to the order to show cause, issued out of said court, on the 26th day of June, 1905.

That the said defendant is a corporation, organized under the laws of the State of Montana, and that all of its stockholders are citizens and residents of the United States, and of the State of Montana, and that they, or their predecessors in interest were qualified to make entries of public lands, under the land laws of the United States;

That there are about twenty stockholders, owning stock in said corporation, and that each of said stockholders is the owner of land, or in the possession of land, under and by virtue of entries made under the land laws of the United States, all of which said lands are occupied by the said stockholders respectively, and are situated on the Milk River, or its tributaries, within

the valley and watershed of said stream, and that said lands are arid, riparian, agricultural lands, and will not produce crops unless they are irrigated, and when said lands are irrigated, they are productive, and produce large crops of hay, grain and other farm products.

That the said stockholders, and each of them, or their predecessors in interest, during the years 1895 and 1896, and most of them during the year 1895, for the purpose of irrigating and rendering productive the lands held by them respectively, and for household and other domestic uses, and under and by virtue of the laws of the United States, the laws of the State of Montana, and the decisions of its courts, and the rules and customs of the country, appropriated and diverted from the North Fork of said Milk River an amount of water sufficient to irrigate their said lands respectively, owned and occupied by them, and conveyed the same through the ditch, hereinafter mentioned, and through laterals radiating therefrom, to, over and upon their said lands respectively, and used the same for irrigating said lands and producing hay, grain and other crops thereon, and for household and other domestic purposes, and in all things complied with the laws of the United States, the laws of the State of Montana, the decisions of its courts, and the rules and customs of the country relating to diverting and appropriating water for beneficial purposes.

That the said North Fork of Milk River is a non-navigable stream, and at the time the said waters were so diverted, appropriated and conveyed, the lands along

the banks of said stream, above the point of said diversion, were unappropriated public lands.

That the said stockholders are not parties to this suit other than as they are interested as stockholders of the defendant Cook's Irrigation Company.

That the said stockholders, or their predecessors in interest, relying upon the land laws of the United States, and the rights granted to appropriators of water, for the purpose of reclaiming desert lands, made entries, under the land laws of the United States, of the lands held by them respectively, and diverted and appropriated the waters of said North Fork of said Milk River, as aforesaid.

That the said lands, owned and occupied by the said defendants and its stockholders, are so situated that the said waters can be more economically conveyed to the same through one ditch, and then distributed to the several tracts by laterals connecting therewith, and for the more economical use of the said water, and the construction of a ditch for conveying the same to said lands, the said stockholders organized the corporation of Cook's Irrigation Company, for the purpose of constructing and maintaining an irrigation ditch to reclaim and irrigate the lands of the said stockholders so occupied by them; the rights of the said stockholders being determined by the amount of water appropriated by them, and the amount of stock of said corporation owned by them respectively.

That the said defendant, Cook's Irrigation Company, and its stockholders, who are citizens of the United

States, as aforesaid, acting under the laws of the United States, and the laws of the State of Montana, the decisions of its courts, and the rules and customs of the country, and for the purpose of conveying water to, over and upon their said lands, for the purpose of reclaiming the same, constructed an irrigation ditch, tapping the waters of said North Fork of Milk River, and expended thereon in labor and money the sum of over twenty thousand dollars ($20,000.00), and which ditch is eighteen feet wide, two and one-half feet deep, and ten miles long, with an average fall of twelve inches per mile, and with numerous laterals leading therefrom to the different tracts of land, owned by the said stockholders.

That the construction of said ditch was commenced on or about the first day of October, 1895, and work thereon was prosecuted with reasonable diligence until the same was completed, and the same was used for conveying water to irrigate said lands, commencing with the year 1896, and has been used continuously since that time, and for the purposes aforesaid, by this defendant and its said stockholders.

That this defendant and its said stockholders have heretofore irrigated from said ditch in the aggregate about three thousand (3,000) acres of land, and that the said ditch and its laterals will cover and irrigate over five thousand (5,000) acres of land, and the said stockholders are extending their works of irrigation and reclaiming the lands covered by said ditch and its laterals.

That the amount of water of said stream, appropri-

ated by the said defendant and its stockholders, as aforesaid, and conveyed through said ditch and its laterals, and used for the purpose of irrigating said lands and other purposes, as aforesaid, exceed fifty (50) cubic feet per second, and two thousand (2,000) miner's inches, and the said use of said waters is a reasonable use thereof.

That by reason of the said appropriations and diversion of said waters, a large area of lands have been reclaimed and made productive, and lands theretofore unoccupied and unproductive were settled upon and improved, and homes established thereon, and large amounts were expended for building residences, barns and other outbuildings, and building fences, constructing roads, bridges and other improvements, exceeding in all more than one hundred thousand dollars ($100,000.00).

That if the said defendant, Cook's Irrigation Company, is enjoined from conveying said water, through its said ditch, for the use of said stockholders, the said defendant, and its stockholders, will be greatly and irreparably damaged, and the said lands will be greatly depreciated in value, and a large portion thereof must be abandoned as homes, and the said defendant's ditch will be rendered worthless; and unless the temporary restraining order herein is dissolved, or so modified that the said defendant may convey said water for the use of its stockholders, within a period of five days, large areas of their hay and grain will be ruined, to their great and irreparable damage.

That by reason of said ditch, so constructed by the defendant, Cook's Irrigation Company, and ditches constructed by other persons, conveying water from said Milk River and its tributaries, the waters of said stream, at flood time, have been distributed over the lands, and gradually seeped back into the stream, and the flow of said stream was thereby made more uniform and continued in a larger volume during the dry season than it was prior to the time the said irrigation works were constructed and the waters of said stream so used; that before the said irrigation works were constructed and the said waters so used, the said Milk River was accustomed to going dry during the late summer and fall.

That since the injunction was issued herein, the flow of water in said stream has been far in excess of the needs of the complainant herein, and a large amount of water is flowing past the said reservation.

That prior to the time the said ditch was constructed and the said waters appropriated, diverted and used, as aforesaid, there was no appropriation of water made upon the said Indian Reservation, for agricultural or other purposes, excepting a small pumping plant, which was used for pumping water for use for domestic purposes, and to irrigate not to exceed eight acres of land; that said pumping plant, since the said ditch was constructed and the appropriation made as aforesaid, has been greatly enlarged, and the said plant now consists of an engine, having a cylinder nine and one-half inches inside diameter, with twelve inch stroke, at ninety pounds pressure, running at one hundred and fifty revo-

lutions per minute, and raising water sixteen feet, and part of it fifty feet, to a tank to be used for culinary purposes. That said pumping plant is not being run continuously, and the said lands so irrigated do not require to exceed one acre foot per acre of water during the entire year, and that not more than three hundred people are supplied at the said Indian Agency with water for domestic and culinary purposes.

That there are springs and other streams upon the said reservation sufficient to supply stock pastured thereon, and that the stock pastured upon said reservation seldom go to the said Milk River to drink.

That the said appropriation, mentioned in the complaint, claimed to have been made by the complainant, in the year 1898, is through a ditch about eighteen feet wide, two and one-half feet deep, with a fall of about nine inches to the mile, and, according to deponent's best information and belief, the said ditch has not any branches or laterals, excepting one, and only a small amount of land is irrigated thereby, and only a small amount of water is applied to any beneficial use or purpose.

That the said Milk River, above the said reservation, is fed by numerous tributaries, and that long since the canal was constructed by the Cook's Irrigation Company, and the said water appropriated, diverted and used, as hereinbefore set forth, divers and sundry persons and corporations have, on the said tributaries and on the main stream of said Milk River, constructed dams and ditches, and diverted, appropriated and conveyed,

and still continue to divert, appropriate and convey large quantities of said waters of said tributaries and said Milk River, in excess of fifteen thousand (15,000) inches, and thereby prevent the same from flowing down said stream, which said persons and corporations are not parties to this suit, and that a large portion of the waters flowing through the said North Fork of said Milk River, which of right belong to the said Cook's Irrigation Company, and its stockholders, and which are now permitted to flow down the said stream, on account of the injunction herein, are taken up and used by some of the said subsequent appropriators, and do not reach the said reservation.

Deponent further says, that Christ Kruse, one of the defendants in this action, is the owner and occupant of lands situated within the valley and watershed of said North Fork of Milk River, and is the owner or beneficiary of one-half share of stock in the defendant, Cook's Irrigation Company.

JAS. N. COOK.

Subscribed and sworn to before me this 17th day of July, A. D. 1905.

[Seal] JAMES A. WALSH,
Notary Public in and for Lewis and Clark County, State of Montana.

State of Montana, }
County of Lewis and Clark. } ss.

John D. Blackstone, being duly sworn, says that he is one of the directors of the defendant, Cook's Irrigation Company, and is acquainted with the stockholders thereof, and with the matters and things set forth in the foregoing affidavit.

That he has read the foregoing affidavit and knows the contents thereof, and the same is true of his own knowledge.

JOHN D. BLACKSTONE.

Subscribed and sworn to before me this 17th day of July, A. D. 1905.

[Seal] JAMES A. WALSH,
Notary Public in and for Lewis and Clark County, State of Montana.

[Endorsed]: Filed and entered July 17th, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 17th day of July, A. D. 1905, the affidavit of N. A. Sharpless was filed herein, being in words and figures as follows, to wit:

**Affidavit of N. A. Sharpless.**

State of Montana, }
County of Lewis and Clark. } ss.

N. A. Sharpless, being first duly sworn, deposes and says: I reside near Chinook, Montana. On July 13th,

1905, in company with one J. E. Sharpless, I visited the Fort Belknap Indian Agency and Reservation described in the bill of complaint, and inspected the irrigating ditch, described in the bill of complaint, from the point where it diverts the waters from Milk River to its extreme limits. The said ditch is about 18 feet wide at the head, and is about 14 miles in length on a straight line. The main ditch, however, extends, according to my opinion, about three miles, at which point it is divided into two branches. There are no laterals constructed from the main or branch ditches, but at varying intervals headgates have been constructed into the sides of these branch ditches. So far as I was able to observe there had been no irrigation of plowed lands from the said ditches, but various patches of hay land had been irrigated by turning the water out of the branch ditches through these headgates and allowing it to flow according to the natural flow of the land down to and upon the little patches of grass scattered about the reservation contiguous to the ditch. I talked with one Morgan, the Agency Farmer, and he told me that he had just commenced irrigating his plowed lands, and that during the year 1905 he had irrigated about 160 acres of hay land. I also saw the pump and pumping plant at the agency; the flume carrying the water from the said pump appeared to be, and was represented to me to be 11x20 inches, and there had been irrigated in the vicinity of the agency for the raising of garden crops not to exceed five acres of land. I do not know that the garden had been irrigated this year at all, but it appeared to be about five

acres in size, and they claimed to have irrigated that body of land. N. A. SHARPLESS.

Subscribed and sworn to before me this 17th day of July, 1905.

[Seal] STEPHEN CARPENTER,
Notary Public in and for said County and State.

[Endorsed]: Filed July 17, 1905. Geo. W. Sproule, Clerk.

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## Testimony.

And thereupon, after filing and reading the several affidavits introduced in behalf of the defendants in said cause, the complainant produced the following-named witnesses, who were duly sworn, and testified substantially as follows:

W. R. LOGAN testified substantially as follows: I am the United States Indian Agent, having charge and superintendency of the Fort Belknap Indian Reservation; I have been such agent on said reservation since the year 1902. That waters from said Milk River are used for household, culinary, domestic and irrigation purposes upon said reservation. That the means by which said waters are taken and diverted from said river consist of a pumping plant, used and operated for the purpose of supplying necessary waters, required for the maintenance of the agency and schools, and the irrigation of land immediately adjoining and surrounding the agency and school buildings. That there are two

(Testimony of W. R. Logan.)

pumping plants in operation: One pumping plant supplies the agency proper with water for household, domestic and irrigation purposes, and was constructed in 1889 and 1890, which is the time when the agency buildings were constructed and erected. The capacity of that pumping plant is 100 inches. The other pumping plant, supplying the schools and other buildings with the requisite amount of water, necessary to supply the same, was constructed in 1893 or 1894, and has a capacity of 150 inches, making a total capacity of the two plants 250 inches. That, in the year 1898, the Government commenced to construct a canal, tapping the waters of Milk River, for the purpose of conducting said water upon the Fort Belknap Indian Reservation, for the use of the Indians residing thereon, for irrigating purposes. That said ditch was extended from time to time, and is now about eleven miles long, consisting of two branches. That the said canal has been in operation, taking and diverting the waters of Milk River, ever since the year 1898, conducting the same upon said reservation for irrigating purposes. That ever since the year 1898, said waters have been used for irrigating purposes, and that, at this time approximately 5,000 acres of land are being irrigated upon said reservation, for the purpose of producing crops of hay, grain and vegetables. That these lands are irrigated with the waters diverted by means of said canal, and by means of the lateral ditches, dis-

(Testimony of W. R. Logan.)

tributing said waters from said canal upon the lands irrigated. That the cultivated area of the lands upon said reservation has been enlarged and extended from year to year, and that there are upon said reservation approximately about 30,000 acres of land, which are susceptible of irrigation, with waters of Milk River, taken and diverted through said canal. That the present necessities of the Indians upon said reservation, for household, domestic and irrigating purposes, require at lease five thousand inches of the waters of the stream.

C. T. PRALL testified substantially, as follows: I am a civil engineer, and a graduate of Cornell College. I am connected with the United States Geological Survey. On or about the 5th day of July, 1905, upon the request of the United States Indian Agent, Logan, I measured the water then diverted from Milk River, and flowing in the Government canal of the Belknap Reservation. I found flowing in said canal, at the time, one thousand inches of water, which was all the water flowing in Milk River, at the point of diversion, except about one hundred and fifty inches, which escaped through the dam. I did not make any measurements of the depth, width or grade of the canal, for the purpose of ascertaining the carrying capacity thereof; but from my observation of the size of the canal, and the amount of water flowing therein at that time, I estimated that the canal would carry at least five times the amount of water that was then flowing therein.

THOMAS M. EVERETT testified substantially as follows: I have resided at Harlem sixteen years, and have been familiar with the use of waters out of Milk River, above the Fort Belknap Indian Reservation ditch during that period of time. I know the defendants, Thomas Downs and John Buckley. When they first began using the waters of Milk River, they took them out through a ditch built by Davis and one Fisher. I also know the Matheson ditch. Several users of water through the Matheson ditch originally took water from Milk River, through the Fisher ditch. The Matheson ditch has been enlarged since it was first constructed, and several parties are now using water from it, who were not interested in it at the time it was built.

Mr. Everett further testified to the use of water from the said Indian Reservation, substantially corroborating the witness Logan.

[Endorsed]: Filed and entered Aug. 15, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 7th day of August, 1905, a memorandum order was duly made and entered herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

## Memorandum Order.

HUNT, Judge, Orally:

I think that an injunction should be granted. Prior to 1888 nearly the whole of Northern Montana north of

the Missouri River and eastward from the main chain of the Rocky Mountains was recognized as Indian country, occupied in part by the tribes of Indians now living upon the Fort Belknap Reservation. By the treaty of May, 1888, the Indians "ceded and relinquished to the United States" their title and rights to lands not embraced within the reservation then established as their permanent homes. The purposes of the treaty were that means might be had to enable the Indians to become "self-supporting, as a pastorial and agricultural people, and to educate their children in the paths of civilization."

The consideration for the cession and relinquishment was that the United States should spend annually a large sum of money for the Indians in the purchase of live stock, agricultural implements, and other things, in assisting the Indians to build homes and inclose their farms, and in any other respect to promote their civilization, comfort and improvement.

Article III, Treaty of May 1, 1888, 25 Statutes at Large, 114.

The "cultivation of the soil" was also specially mentioned by Article V of the treaty.

A fair construction of the preamble and provisions of the treaty is that an essential object thereof was to encourage farming among the Indians. This being correct, notice of conditions of climate and soil of Montana tell us that water for irrigation is indispensable in successful farming throughout that portion of Montana wherein the Belknap Reservation lies.

The parties to the agreement evidently appreciated this necessity, and purposely fixed the boundary line of the reservation at a point in the middle of the main channel of Milk River opposite the mouth of People's Creek, and thence up Milk River in the middle of the main channel thereof to the place of beginning.

I believe the intention was to reserve sufficient of the waters to insure to the Indians the means wherewith to irrigate their farms.

This construction of the treaty seems to me to be in accord with the rules which the Supreme Court has repeatedly laid down in arriving at the true sense of treaties with Indians.

United States vs. Winans, decided May 15, 1905.

While in the treaty of October 8, 1895, reference is made to a scarcity of water which renders the pursuit of agriculture "difficult and uncertain," yet article II of that treaty expressly refers to the irrigation of the farms of the Indians.

Irrigation was undoubtedly contemplated and was provided for, although the treaty of 1895 recognized that probably the main reliance of the Indians for self-support would be found in cattle raising.

In my judgment, when the Indians made the treaty granting rights to the United States they reserved the right to the use of the waters of Milk River, at least to an extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees as well as against the State and its grantees.

From this it follows that patents if any issued by the Land Department for lands held by defendants are subject to the treaty, and defendants can acquire no rights to the exclusion of the reasonable needs of the Indians. These needs appear to be five thousand inches. To that extent injunction will issue.

U. S. vs. Winans, supra.

WM. H. HUNT,
Judge.

August 7, 1905.

[Endorsed]: Filed and entered August 7, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 8th day of August, A. D. 1905, an interlocutory order for a general injunction was duly made and entered herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

## Interlocutory Order.

A preliminary writ of injunction having been duly issued against the defendants in said above-entitled cause on the 26th day of June, A. D. 1905, and an order having been issued on said day, requiring the said defendants and each of them to show cause on the 17th day of July, A. D. 1905, why a general injunction during the pendency of this suit should not issue against them and each of them, as prayed for in complainant's bill of complaint, and the said defendants in pursuance of said

order so made as aforesaid, having duly appeared on said 17th day of July, A. D. 1905, and filed and submitted on said day their affidavits and the affidavits of other persons in opposition to the granting of the injunction pendente lite, as prayed for in complainant's bill of complaint, and other evidence having been submitted upon said hearing from which it appears that the said complainant, the United States of America, requires for its uses upon the Fort Belknap Indian Reservation not less than five thousand inches of the waters of Milk River for household, domestic, culinary and irrigating purposes, and that it is entitled to the use of said waters as against each of said defendants, and it appearing to the Court that the complainant is entitled to a general injunction during the pendency of this suit, enjoining and restraining said defendants, and each of them, from in any manner interfering with the use of said waters by the Government of the United States upon said Indian Reservation.

Now, therefore, in consideration of the premises, it is hereby ordered and adjudged that a general injunction during the pendency of this suit be, and the same is hereby granted against the said defendants, and each of them, and their attorneys, agents, servants and employees and of each of them, and it is further ordered that a writ of injunction during the pendency of this suit issue against said defendants, and each of them, and each of their agents, attorneys, servants and employees in accordance with the prayer of complainant's bill of complaint.

Dated this 8th day of August, A. D. 1905.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Filed and entered August 8th, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 15th day of August, A. D. 1905, a petition for order allowing appeal was filed herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

### Petition for Order Allowing Appeal.

Come now the above-named respondents Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, Bertha Resor, Lydia Resor, Ezra T. Resor, Andrew H. Resor, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, conceiving themselves to be aggrieved by the interlocutory order made and entered in the above-entitled cause, in the above-entitled court, on the 8th day of August, 1905, wherein and whereby it was ordered and decreed that the respondents, pending the official hearing and decree herein, be enjoined from in any manner interfering with the use by the Government of the United States upon the Fort Belknap Indian Reservation of not less than 5,000 inches of the waters of Milk River for household, domestic, culinary and irrigating purposes,

and by which interlocutory order complainant was awarded a general injunction during the pendency of this suit against the said respondents and each of them, and hereby petition said Court for an order allowing said respondants and each of them to prosecute an appeal from said interlocutory order granting said writ of injunction to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which said respondents shall give and furnish upon such appeal, and that upon the giving of said security all further procedings in this court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit. And your petitioners will ever pray, etc.

E. C. DAY,

Solicitor for Henry Winters, John W. Acker, Agnes Downs, Thomas Downs, Bertha Resor, Lydia Resor, Ezra T. Resor, Andrew H. Resor, Henry Corregan, Matheson Ditch Company, a Corporation, and Empire Cattle Company, a Corporation.

B. PLATT CARPENTER, and

STEPHEN CARPENTER,

Of Counsel for Said Respondents.

E. C. DAY and

JAS. A. WALSH,

Solicitors and of Counsel for all Respondents.

JAMES A. WALSH,

Solicitor for Chris Kruse and the Cook Irrigation Company.

SANDS & O'KEFFE and

C. C. NEWMAN,

Of Counsel for Said Respondents.

[Endorsed]: Filed and entered August 15th, 1905. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 15th day of August, A. D. 1905, an assignment of errors was duly filed herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

## Assignment of Errors.

The respondents file the following assignment of errors, upon which they and each of them will rely upon their appeal from the interlocutory order made by this Honorable Court on the 8th day of August, 1905, granting an injunction in said cause:

The respondents assign as error upon this appeal the following, to wit, the Circuit Court ererd in making the interlocutory order granting an injunction in this case, for the following reasons:

1. The said Circuit Court erred in holding that by the treaty made and entered into the first day of May, 1888, between the United States and the Indians residing upon the Fort Belknap Indian Reservation, there was reserved to the said Indians the right to the use of the waters of Milk River to an extent reasonably neces-

sary to irrigate the lands included in the reserve created by the said treaty, and that by the said treaty there was reserved to the said Indians the right to the use of said waters at all.

2. The said Circuit Court erred in holding that the reservation of the waters of Milk River, if any, contained in the treaty of May 1, 1888, entered into by the United States, to the Indians residing upon the Fort Belknap Reservation, was binding upon respondents or any of them so as to affect the rights of the respondents to the use of the waters of the tributaries of said Milk River based upon acts of appropriation done and had in pursuance to the laws of the United States, the laws of the State of Montana and decisions of its courts, and the customs of the country.

3. The said Circuit Court erred in holding that the rights of the Indians living upon said reservation to the use of the waters of Milk River were superior to the rights of the respondents or either of them, for the reason that the proof showed affirmatively and without contradiction tht the respondents and each of them had diverted, appropriated and applied to a useful purpose the waters of the said river or its tributaries, according to the laws of the United States, the laws of the State of Montana and decisions of its courts, and customs of the country to the extent claimed by them, and there was no proof showing that there had ever been an appropriation of the said waters according to the said laws, decisions and customs of the said waters or any thereof

according to the said laws, decisions and customs by the said Indians, or on their behalf.

4. The said Circuit Court erred in holding that the Indians residing upon said reservation, or the United States for their use and benefit, were entitled as against these respondents or either of them to the prior right to the use of 5,000 inches of the waters of Milk River, or to the prior right to the use of the said waters at all.

In order that the foregoing assignment of errors may be and appear of record the respondents present the same to the Court and pray that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

CARPENTER, DAY & CARPENTER,
Solicitors for Henry Winters, et al.

WALSH & NEWMAN,
Solicitors for Cook's Irrigation Company, et al.

[Endorsed]: Filed and entered August 15, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 15th day of August, A. D. 1905, an order allowing appeal was duly made and entered herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

**Order Allowing Appeal.**

Upon motion of said Messrs. E. C. Day and James A. Walsh, Esq., counsel for respondents and upon filing the petition of Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, Bertha Resor, Lydia Resor, Ezra T. Resor, Andew H. Resor, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, for an order allowing appeal, together with assignment of errors:

It is ordered that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory order entered August 8, 1905, granting an injunction pendente lite against respondents herein; that the amount of the bond upon said appeal be and is hereby fixed at the sum of three hundred dollars; and that a certified copy of the records and proceedings herein be prepared and transmitted to the said Circuit Court of Appeals August 15th, 1905.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Filed and entered August 15, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the the 15th day of August, A. D. 1905, a bond on appeal was duly filed herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

## Bond on Appeal.

Know all men by these presents, that we, Henry Winters, et al., as principals, and the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland for the purpose of becoming surety upon bonds and obligations required by law, as surety, are jointly and severally held and firmly bound unto the above-named the United States of America in the sum of three hundred dollars, lawful money of the United States of America, to be paid to the United States of America, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated the 15th day of August, A. D. 1905.

The condition of the above obligation is such that, whereas, the said Henry Winters, et al., have taken an appeal to the Circuit Court of Appeals for the Ninth Circuit, to reverse the interlocutory order rendered and entered by the Circuit Court of the United States for the Ninth Judicial Circuit, in and for the District of Montana, which order was made and entered in the above-entitled suit on the 8th day of August, 1905.

Now, therefore, the condition of the above obligation is such that if the above-named Henry Winters, et al., appellants herein, shall prosecute said appeal to effect, and answer all damages and costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

HENRY WINTERS, JOHN W. ACKER, AGNES DOWNS, THOMAS DOWNS, BERTHA RESOR, LYDIA RESOR, EZRA T. RESOR, ANDREW H. RESOR, HENRY CORREGAN, MATHESON DITCH COMPANY, a Corporation, and EMPIRE CATTLE COMPANY, a Corporation,

By CARPENTER, DAY & CARPENTER,

Their Attorneys.

CHRIS KRUSE, and
COOK'S IRRIGATION COMPANY,
By WALSH & NEWMAN,

Their Attorneys.

THE UNITED STATES FIDELITY AND GUARANTY CO.,

[Corporate Seal] By FRANK BOGART,

Attorney in Fact.

[Endorsed]: The within bond is hereby approved this 15th day of August, 1905.

WILLIAM H. HUNT,

Judge.

Filed and entered August 15, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 15th day of August, A. D. 1905, a citation was duly issued herein, being in the words and figures as follows, to wit:

## Citation.

UNITED STATES OF AMERICA—ss.

President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 14th day of September next, pursuant to an order allowing an appeal entered in the clerk's office of the Circuit Court of the United States for the District of Montana, in that certain action numbered 747, in which Henry Winters and others are respondents and appellants, and you are the complainant and appellee, to show cause, if any there be, why the interlocutory order made and entered against the said respondents and appellants as in the said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM H. HUNT, Judge of the United States District Court, in and for the District of Montana, this 15th day of August, 1905.

WILLIAM H. HUNT,
District Judge.

Service of the within citation and receipt of a copy thereof admitted this 15th day of August, 1905.

CARL RASCH,

United States District Attorney, Solicitor for Appellee and Complainant in Lower Court.

[Endorsed]: Filed and entered Aug. 15th, 1905. Geo. W. Sproule, Clerk.

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## Clerk's Certificate to Transcript.

United States of America, }
District of Montana. } ss.

I, George W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 142 pages, numbered consecutively from 1 to 142, is a true and correct transcript of the pleadings, process, orders, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of sixty-five 75/100 ($65.75) dollars and has been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States Circuit Court for the District of Montana, at Helena, Montana, this 18th day of August, A. D. 1905.

[Seal] GEO. W. SPROULE,
Clerk.

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[Endorsed]: No. 1243. United States Circuit Court of Appeals for the Ninth Circuit. Henry Winters et al., Appellants, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed September 2, 1905.

F. D. MONCKTON,
Clerk.

**No. 1243.**

# UNITED STATES

# CIRCUIT COURT OF APPEALS

## For the Ninth Circuit

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HENRY WINTERS, ET AL,

Appellants.

vs.

THE UNITED STATES OF AMERICA,

Appellee.

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BRIEF FOR APPELLANTS.



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B. PLATT CARPENTER,
E. C. DAY,
STEPHEN CARPENTER,
JAMES A. WALSH,
C. C. NEWMAN,
R. E. O'KEEFE,
Solicitors and of Counsel for Appellants.

No. 1243.

# UNITED STATES

# CIRCUIT COURT OF APPEALS

## For the Ninth Circuit

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HENRY WINTERS, ET AL,

Appellants.

vs.

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Appellee.

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## BRIEF FOR APPELLANTS.

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### STATEMENT OF FACTS.

This is an appeal from an interlocutory order enjoining the defendants and each of them from interfering in any manner with the use of 5,000 inches of waters of Milk River in the State of Montana by the Government of the United States upon the Fort Belknap Indian Reservation in said State (Tr. p. 87). The interlocutory order was entered after a hearing in response to an order to show cause (Tr. p. 21) made upon the filing of a Bill of Complaint (Tr. p. 5) which, after the formal allegation as to the parties, alleged among other things as follows:

"Fourth.

"That heretofore, to-wit, on or about the 1st day of May, A. D. 1888, a large tract of land situate within the northern part of the then Territory, now State of Montana, and then and there and thereafter, and at all times hereinafter mentioned, the property of your orator the said United States, was reserved and set apart by the said United States as an Indian Reservation as and for the permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the State (then Territory) of Montana, designated and known as the Fort Belknap Indian Reservation, that the said Indian Reservation is now situate in the county of Chouteau, in the State and District of Montana, and its boundaries were at the said time of the creation of said reservation fixed and defined as follows, to-wit:

Beginning at a point in the middle of the main channel of Milk River, opposite the mouth of Snake Creek; thence due south to a point due west of the western extremity of the Little Rocky Mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk River opposite the mouth of Peoples Creek; thence up Milk River, in the middle of the main channel thereof, to the place of beginning.

That ever since the said 1st day of May, A. D. 1888, the said aforementioned and described tract of land has been, and the same is now an Indian Reservation, and the property of your orator subject to the occupancy of the said bands or tribes of Indians, and the same ever since the 1st day of May, A. D. 1888, has been and is now occupied and

inhabited by the said bands or tribes of Indians as and for their permanent home and abiding place.

Fifth.

That the said Fort Belknap Indian Reservation extends to the middle of the main channel of said Milk River, which said river is a non-navigable stream and water course, the said line in the middle of the main channel of said Milk River being the northern boundary line of said reservation. That large portions of the lands embraced within said reservation are well fitted and adapted for pasturage and the grazing and feeding thereon of stock and horses and cattle. That other large portions of said reservation are adapted for, and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of crops of grass, grain, and vegetables. That ever since the establishment of said Indian Reservation large herds of cattle, the property of your orator and of the Indians residing upon said reservation, and large numbers of horses, the property of said Indians, have been and are now feeding, pasturing and grazing upon said reservation and upon the lands within said reservation being and situate along and bordering upon said Milk River.

Sixth.

That such portions of the said Fort Belknap Indian Reservation as are adapted and fitted for farming and cultivation and the pursuits of agriculture thereon, as aforesaid, are of a dry and arid character, and in order to make the same productive, and for the purpose of successfully raising thereon crops of grain, grass and vegetables, require large quantities of water for the purpose of irrigating the same. That without water for the irrigation of said lands, the same would be and remain unproductive, and it

would be impossible to successfully raise upon said lands crops of grain, grass, and vegetables. That heretofore, in the year 1889, your orator erected and constructed houses and buildings upon said reservation for the occupancy and residence of the United States Indian agent and the officers of your orator having the charge and superintendency of said reservation and the Indians residing thereon, generally known as the Fort Belknap Agency, and ever since the said year 1889, the said buildings and premises have been occupied by the United States Indian Agent and the officers and agents of your orator having charge and superintendency of said reservation. That the said agency depends entirely for its water supply for domsetic, culinary and irrigation purposes upon the waters of the said Milk River, and that at all times, ever since the erection of said houses and buildings and the establishment of said agency, your orator has been obliged and is now obliged to depend for its water supply for said agency and for the purposes aforesaid upon the waters of said Milk River. That heretofore, and long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to-wit, in the year 1889, your orator through its officers and agents at said Fort Belknap Agency, for the purpose of obtaining the requisite amount of water for domestic, culinary and irrigating purposes for said agency appropriated, took and diverted from the channel of said Milk River, by means of pumps, pipes and waterways a large amount, to-wit, a flow of one thousand miners inches of the waters of said Milk River, and by means of pumping the same out of the channel of said Milk River, and by ditches, pipes and waterways conducted the said waters of said river, so taken and diverted from said river as aforesaid, from the channel of said river to the said agency

buildings and premises, and after so conducting the said waters to said agency buildings and premises, used the same for domestic, household and culinary purposes, and also for the irrigation of lands adjacent to, connected with and surrounding said agency buildings and premises, and by means of the use of said waters for irrigation purposes raised upon said premises adjacent to and connected with said agency crops of grain, grass and vegetables. That thereafter, but long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to-wit, on the 5th day of July, A. D. 1898, your orator and the Indians residing upon said reservation, for the purpose of bringing and conducting water to and upon the lands of said Fort Belknap Indian Reservation with which to irrigate the same and raise thereon crops of grain, grass and vegetables, appropriated, took and diverted from the channel of said Milk River, by means of canals, ditches and waterways, additional large amounts of the waters of said Milk River, to-wit, a flow of ten thousand miners inches of the waters of said river, and by means of canals, ditches and waterways conducted the water of said river, so taken and diverted from the said river as aforesaid, from the channel of said river to and upon divers and extensive tracts of land upon said reservation aggregating in amount about thirty thousand acres of land, and after so conducting said water to and upon said lands used the same for irrigation of said lands, and for domestic and other useful purposes, and by means thereof raised upon said lands crops of grain, grass and vegetables.

That ever since the said year 1889, and down to the time of the commission of the wrongs and grievances committed by the said defendant as hereinafter set out and complained of, your orator and its officers and agents residing

at said agency, have constantly and uninterruptedly used and enjoyed the said waters of said Milk River so taken and diverted as aforesaid in the year 1889, at and upon said agency for domestic, culinary and household purposes, and for the irrigation of the lands and premises adjacent to and connected with said agency, and for raising upon said premises crops of grain, grass and vegetables, and ever since the said year 1898, and down to the time of the commission of the wrongs and grievances by the said defendants hereinafter set out and complained of, your orator and its officers and agents and the said Indians residing upon the said reservation as aforesaid, have continuously and uninterruptedly used and enjoyed the said waters of said Milk River so appropriated, taken and diverted as aforesaid, on the 5th day of July, 1898, upon said lands embraced within said reservation for irrigating, domestic and other useful purposes, and by means of said waters so taken and diverted from said Milk River, and used by your orator and the said Indians residing thereon as aforesaid, have raised upon said lands crops of grain, grass and vegetables and carried on agricultural pursuits, and your orator has been enabled by means thereof to train, encourage and accustom large numbers of the Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement.

Seventh.

And your orator further showeth unto your Honors that large tracts of lands within said Fort Belknap Indian Reservation, being and situate along and contiguous to the channel of said Milk River, are used by your orator from year to year for the pasturing, feeding, raising, and grazing of livestock, principally horses and cattle, the property of your orator and said Indians residing upon said

reservation. That in order to enable your orator and said Indians to successfully and properly pasture and feed said horses and cattle upon said lands, it is necessary and essential that the waters of said Milk River should be permitted to flow down the channel of said river, to supply and furnish said stock with drinking water. That unless the waters of said river are permitted to flow down the channel of said river, the said cattle and horses, so pasturing and feeding upon said lands, will be deprived of water necessary for drinking purposes, and will render valueless for grazing, feeding and ranging purposes large tracts of lands within said reservation, situate along and contiguous to the channel of said Milk River.

Eighth.

And your orator further showeth unto your Honors that all of the waters heretofore so taken, appropriated and diverted from the channel of said Milk River as aforesaid, are essential and necessary for the use of your orator at the agency on said Fort Belknap Indian Reservation for household, domestic and culinary purposes, and for the purpose of irrigation of the tracts of land adjacent to and connected with said agency, and are essential and necessary for the proper irrigation and reclamation of the lands and premises upon said reservation for the cultivation of which said waters were appropriated, taken and diverted. That in order to enable your orator to maintain said agency, and in order to promote the civilization and improvement of the said bands and tribes of Indians upon said reservation and the encouragement of habits of industry and thrift among them, and in order to make all of the said lands within the said reservation which are adapted and suitable for farming and ranching and the pursuits of agriculture susceptible of cultivation and productive

for the raising thereon of crops of grain, grass and vegetables, large quantities of water flowing in said Milk River will be required and necessary for the purpose of irrigation of the said lands within said reservation and the reclamation of said lands. That for the purpose of subserving and accomplishing the ends and purposes for which said reservation was created, and in order to subserve the best interest of your orator and of the Indians residing upon said reservation, and the best interest of your orator in furthering and advancing the civilization and improvement of said Indians, and to encourage habits of industry and thrift among them, and to induce and enable said Indians to engage in and carry on the pursuits of agriculture and stock-raising as aforesaid, it is essential and necessary that all of the waters of said Milk River should be permitted to flow down the channel of said river, uninterruptedly and undiminished in quantity, and undeteriorated in quality.

Ninth.

And your orator further showeth unto your Honors, that notwithstanding the riparian and other rights of your orator and of the said Indians to the uninterrupted flow of all of the waters of said Milk River, as aforesaid, down the natural channel of said river, the said defendants, heretofore, to-wit, in the year 1900, wrongfully and unlawfully, and without the license, consent or approval and against the wishes of your orator and of the said Indians, and without the license, consent or approval and against the wishes of the Secretary of the Interior of the said United States, and in utter disregard of the rights of your orator and the Indians residing upon the said Fort Belknap Reservation, entered upon the said Milk River and its tributaries above the points of diversion of the said waters of said river by

your orator and said Indians, as aforesaid, and above the places of use of said waters by your orator and said Indians, and built, erected, and constructed in and across the channel of said Milk River and its tributaries large and substantial dams and reservoirs and by means of said dams and reservoirs impeded, obstructed and prevented the waters of said Milk River and its tributaries from flowing down the natural channel of said river to the places of your orator's points of diversion and use of the said waters of the said river. That by means of said dams and reservoirs and by means of canals, ditches and water-ways made and constructed wrongfully and unlawfully and without the license, consent, or approval of the Secretary of the Interior, over and through the public lands of your orator, by the said defendants, said defendants appropriated, took, and diverted all of the waters of the said Milk River and its tributaries out of and away from the channel of said river and its tributaries and by means of said canals, ditches, and water-ways, conducted and conveyed the same long distances away from the channel of said Milk River and its tributaries and away from the said Fort Belknap Indian Reservation. That by means of said dams and reservoirs and said canals, ditches and water-ways said defendants prevent any of the waters of said Milk River and its tributaries from flowing down the channel of said river to your orator's points of diversion and places of use of said waters, and wholly deprived your orator and the Indians residing upon said reservation of the use of the waters of said river, all of which said acting and doings as aforesaid, of the said defendants was without the license, consent or approval of your orator, the said United States, and without the license, consent or approval of the Secretary of the Interior of the said United States."

In response to the order to show cause entered as aforesaid, the defendants made several appearances. The defendant Empire Cattle Company filed and read the affidavits of its President (Tr.p. 31) and Cal. C. Shuler (Tr. p. 35) setting forth that since June 23rd, 1897, it has been a corporation organized and existing under the laws of the State of Montana, with power to acquire and own real and personal property. That it is the owner of certain described lands in Township 33 North of Range 19 East Principal Meridian of Montana, which lands are arid in character and require the use of water for irrigating purposes in order to successfully raise thereon crops of grain, grass and vegetables. "That the title to a large portion of the said lands has been obtained from the United States Government under the laws thereof relating to desert lands, and that the west fork of Milk River flows through the said lands and all of them." That on the 13th day of January, 1899, the defendant, with others, appropriated four thousand inches of the waters flowing in the west fork of Milk River, by posting the statutory notice at the point of diversion, filing a copy thereof for record, and constructing a dam and ditch described in the affidavit, diverting the said waters by means thereof, conducting them upon the described lands, and irrigating said lands during each and every year since 1899, up to and including 1905, to the extent of eight hundred acres. That thereby the defendant became entitled to use sufficient of the said waters of the west fork of Milk River to irrigate eight hundred acres of its said lands.

The defendants Bertha Reser, Lydia Reser, Ezra T. Reser and Andrew H. Reser filed and read the affidavits of Andrew H. Reser and Ezra T. Reser, (Tr. p. 38) showing that on February 12th, 1900, the defendants Bertha Reser

and Lydia Reser, who were each of them then and there qualified citizens of the United States, offered to enter under the Desert land laws of the United States three hundred and twenty acres of land lying in sections 11, 12 and 13, Township 34 north, range 18 East, Principal Meridian of Montana; that on January 26th, 1900, they appropriated fifty cu. ft. per second of the waters of the west fork of Milk River, by posting and recording the statutory notice and by the construction of a described dam and ditch by means of which the said waters were diverted and conducted to and upon the described lands and used in irrigating the same and raising thereon crops of grain, grass and vegetables; that upon the 23rd day of September, 1903, Bertha Reser and Lydia Reser surrendered their filings upon said lands and transferred their water rights to Andrew H. Reser, Ezra T. Reser and Clarence B. Reser, who were then and there qualified citizens of the United States, and who immediately applied to enter the said lands under the Desert Land Laws of the United States. That the defendants Bertha Reser and Lydia Reser have now no interest in said lands and are not using or diverting the said waters. That the waters so appropriated were by these defendants Andrew H. Reser and Ezra T. Reser, together with their associate Clarence B. Reser, taken out and conducted by ditches theretofore constructed to and upon the said lands, and have been used for the purpose of irrigating crops of grain, grass and vegetables during the season of 1905, and the said appropriators have cultivated about two hundred and forty acres of the said land during said season. That about four hundred acres of the said lands so filed upon by the said appropriators are susceptible to cultivation by irrigation, and without the use of the said water the said lands and the whole

thereof would be and remain unproductive, and it would be impossible to successfully raise upon the said lands crops of grain, grass or vegetables. That these defendants and their predecessors in interest have spent large sums of money, to-wit, about the sum of..... dollars in improving said lands and in constructing dams and ditches for the diversion of the said waters and conducting the same upon the said land. That it is the intention of these defendants in good faith to so continue to cultivate the said lands as to enable them to obtain title thereto from the United States under the laws thereof relating to the acquisition of title to desert lands. But that if the said defendants are restricted by order of this Court from using the said waters of the West Fork of Milk River it will be impossible for them to comply with the said laws, and their rights to the said lands as herein above set forth will be forfeited."

The defendant Agnes Dowen presented and read in her behalf her own affidavit to the effect that she was a desert land claimant to a tract of three hundred and twenty acres of unsurveyed public lands in Chouteau County, Montana, and that in the year 1902, she had appropriated for use upon the said lands in reclaiming the same from their arid condition, twelve cu. ft. per second of the waters of the North Fork of Milk River; that it is her intention and good faith to use the said waters upon said lands to obtain title thereto from the United States under the laws thereof relating to the acquisition of title to desert lands, and that if she is restrained by order of this court from using the said waters, her rights to the said land will be forfeited.

The defendants the Matheson Ditch Company, Thomas Dowen, John W. Acher presented and read the affidavits of John Matheson (Tr. p. 48), Thomas Dowen (Tr. p. 52)

John Prosser (Tr. p. 55), John W. Acher (Tr. p. 57), D. E. Martin (Tr. p. 60) and J. S. Roberts (Tr. p. 61) and the response of the Matheson Ditch Company (Tr. p. 47), from which it was made to appear that the Matheson Ditch Company was a corporation organized and existing under the laws of the State of Montana for the purpose of constructing, maintaining and repairing a ditch taken out of the North Fork of Milk River, known as the Matheson North Fork Ditch; but that the Matheson Ditch Company did not own or claim to own any of the waters flowing in the said ditch or in the said stream, but that the Company owned and operated the ditch for the benefit of its share holders owning water rights and entitling them to the use of the waters of said North Fork in the proportion that their respective shares bear to each other, and to the whole amount of shares of said Company outstanding. That the said John Matheson was the owner of about six hundred acres of land lying under the said ditch and had used through the said ditch the waters of the North Fork of Milk River under an appropriation made on the 9th day of May, 1890, by one M. T. Ridout, together with one J. W. Clark, by posting and filing for record the required statutory notices and the construction of a described ditch. That Thomas Dowen and John Buckley used through the said Matheson Ditch at least two hundred inches of the waters of the said North Fork of Milk River by virtue of an appriation made by Alex Buckingham on May 12th, 1895. That John Prosser and Celia A. Gelder were entitled to the use of one hundred inches of the waters of said North Fork of Milk River through the said Matheson Ditch by virtue of an appropriation made by James Davis in the year 1895; that the said defendant John W. Acher was entitled to the use of at least two hundred inches of the

waters of said North Fork of Milk River through the said Matheson Ditch by virtue of an appropriation made by one Fred Davis in the year 1893, and that one H. M. Burrus was entitled to the use of one hundred inches of the waters of the said North Fork of Milk River through said Matheson Ditch by virtue of an appropriation made in the year 1895 by said James Davis, and that the shares of stock in said Matheson ditch were divided as follows:

John Matheson, 56 shares; H. M. Burrus, 15 shares; Thomas Dowen, 20 shares; John R. Prosser, 10 shares; Henry Bosch, 10 shares; John Acher, 5 shares.

The defendant Henry Corregan presented and read the affidavit of himself (Tr. p. 63), showing that he was in the possession of unsurveyed public lands in township 36 North of Range 18 East Principal Meridian of Montana, claiming the right to occupy the same under and by virtue of a Desert Land Entry; that for the purpose of reclaiming the said lands he, with one Sarah Corregan did on the 12th day of October, appropriate 20 cubic feet per second of the waters of the North Fork of Milk River by posting and recording the required notice of appropriation and constructing a described ditch by means of which he diverted the said waters and conducted them upon his said lands to at least the extent of one hundred inches; that it is his intention in good faith to use the said waters upon said lands and to obtain title thereto from the United States under the laws thereof relating to Desert lands, and that if he is restrained by order of this Court from using the said waters his right to the said lands will be forfeited.

The defendant Henry Winter read and filed his own affidavit (Tr. p. 66) showing that he was entitled to the use of 400 inches of the waters of Milk River for the irrigation of certain lands described in the said affidavit under

and by virtue of an appropriation made on the 18th day of March, 1896, by Perry E. Wyncoop and Julia H. Wyncoop, which said appropriation was made by posting and filing for record the required notice of location and the construction of a ditch described in the said affidavit by means of which waters were diverted and conducted to and upon lands therein described and used for the purpose of irrigation.

The defendants the Cook's Irrigation Company and Chris. Kruse presented, first an objection to the issuance of the said injunction, and a motion to dissolve the temporary restraining order (Tr. p. 28, 29), upon the following grounds:

"First. That the bill of complaint is verified only on information and belief, and no affidavit in support of the allegations has been filed or submitted.

Second. That it does not appear that the complainant is entitled to maintain an action for and in behalf of the Indians located upon the reservation mentioned in the complaint.

Third. It does not appear that the defendants are joint tortfeasors.

Fourth. It does not appear that the defendants did not appropriate and divert waters according to the laws of the United States, the laws of the State of Montana and decisions of its courts, and the customs of the country.

Fifth. It does not appear in the bill of complaint that the defendants are not riparian proprietors upon the said Milk River and its tributaries.

Sixth. And for other reasons appearing in the bill of complaint herein."

The said defendants also read and filed the affidavits of James N. Cook and John D. Blackstone (Tr. p. 70) from

which it appeared that the Cook's Irrigation Company was a corporation organized under the laws of the State of Montana, and its stockholders were citizens and residents of the United States, and of the State of Montana, and they and their predecessors in interest were qualified to make entries of public lands under the land laws of the United States; that there were about twenty stockholders of the said corporation, each of which were the owners of lands or in the possession thereof under and by virtue of the land laws of the United States; that there were about twenty stockholders of the said corporation, each of which were the owners of lands or in the possession thereof under and by virtue of the land laws of the United States, all of which lands were situated on the Milk River or its tributaries within the valley and water sheds of said stream, and which were arid riparian agricultural lands and would not produce crops unless irrigated.

That the said stockholders, and each of them, or their predecessors in interest, during the years 1895 and 1896, and most of them during the year 1895, for the purpose of irrigating and rendering productive the lands held by them respectively, and for household and other domestic uses, and under and by virtue of the laws of the United States, the laws of the State of Montana, and the decisions of its courts, and the rules and customs of the country, appropriated and diverted from the North Fork of said Milk River an amount of water sufficient to irrigate their said lands respectively, owned and occupied by them, and conveyed the same through the ditch, hereinafter mentioned, and through laterals radiating therefrom, to, over and upon their said lands respectively, and used the same for irrigating said lands and producing hay, grain and other crops thereon, and for household and other domestic

purposes, and in all things complied with the laws of the United States, the laws of the State of Montana, the decisions of its courts, and the rules and customs of the country relating to diverting and appropriating water for beneficial purposes.

That the said North Fork of Milk River is a non-navigable stream, and at the time the said waters were so diverted, appropriated and conveyed, the lands along the banks of said stream, above the point of said diversion, were unappropriated public lands.

That the said stockholders are not parties to this suit other than as they are interested as stockholders of the defendant Cook's Irrigation Company.

That the said stockholders, or their predecessors in interest, relyng upon the land laws of the United States, and the rights granted to appropriators of water, for the purpose of reclaiming desert lands, made entries, under the land laws of the United States, of the lands held by them respectively, and diverted and appropriated the waters of said North Fork of said Milk River, as aforesaid.

That the said lands, owned and occupied by the said defendants and its stockholders, are so situated that the said waters can be more economically conveyed to the same through one ditch, and then distributed to the several tracts by laterals connecting therewith, and for the more economical use of the said water, and the construction of a ditch for conveying the same to said lands, the said stockholders organized the corporation of Cook's Irrigation Company, for the purpose of constructing and maintaining an irrigation ditch to reclaim and irrigate the lands of the said stockholders so occupied by them; the rights of the said stockholders being determined by the amount of water appropriated by them, and the amount

of stock of said corporation owned by them respectively.

That the said defendant, Cook's Irrigation Company, and its stockholders, who are citizens of the Unitted States, as aforesaid, acting under the laws of the United States and the laws of the State of Montana, the decisions of its courts, and the rules and customs of the country, and for the purpose of conveying water to, over and upon their said lands, for the purpose of reclaiming the same, constructed an irrigation ditch, tapping the waters of said North Fork of Milk River, and expended thereon in labor and money the sum of over twenty thousand dollars ($20,000.00) and which ditch is eighteen feet wide, two and one-half feet deep, and ten miles long, with an average fall of twelve inches per mile, and with numerous laterals leading therefrom to the different tracts of land, owned by the said stockholders.

That the construction of said ditch was commenced on or about the first day of October, 1895, and work thereon was prosecuted with reasonable diligence until the same was completed, and the same was used for conveying water to irrigate said lands, commencing with the year 1896, and has been used continuously since that time, and for the purposes aforesaid, by this defendant and its said stockholders.

That this defendant and its said stockholders have heretofore irrigated from said ditch in the aggregate about three thousand (3,000) acres of land, and that the said ditch and its laterals will cover and irrigate over five thousand (5,000) acres of land, and the said stockholders are extending their works of irrigation and reclaiming the lands covered by said ditch and its laterals.

That the amount of water of said stream, appropriated by the said defendant and its stockholders, as aforesaid,

and conveyed through said ditch and its laterals, and used for the purpose of irrigating said lands and other purposes, as aforesaid, exceed fifty (50) cubic feet per second, and two thousand (2,000) miner's inches, and the said use of said waters is a reasonable use thereof.

That by reason of the said appropriations and diversion of said waters, a large area of lands have been reclaimed and made productive, and lands theretofore unoccupied and unproductive were settled upon and improved, and homes established thereon, and large amounts were expended for building residences, barns and other outbuildings, and building fences, constructing roads, bridges and other improvements, exceeding in all more than one hundred thousand dollars ($100,000.00).

That if the said defendant, Cook's Irrigation Company, is enjoined from conveying said water, through its said ditch, for the use of said stockholders, the said defendant, and its stockholders, will be greatly and irreparably damaged, and the said lands will be greatly depreciated in value, and a large portion thereof must be abandoned as homes, and the said defendant's ditch will be rendered worthless; and unless the temporary restraining order herein is dissolved, or so modified that the said defendant may convey said water for the use of its stockholders, within a period of five days, large areas of their hay and grain will be ruined, to their great and irreparable damage.

That by reason of said ditch, so constructed by the defendant, Cook's Irrigation Company, and ditches constructed by other persons, conveying water from said Milk River and its tributaries, the waters of said stream at flood time, have been distributed over the lands, and gradually seeped back into the stream, and the flow of said stream was thereby made more uniform and continued in a larger

volume during the dry season that it was prior to the time the said irrigation works were constructed and the waters of said stream so used; that before the said irrigation works were constructed and the said waters so used, the said Milk River was accustomed to going dry during the late summer and fall.

That since the injunction was issued herein, the flow of water in said stream has been far in excess of the needs of the complainant herein, and a large amount of water is flowing past the said reservation.

That prior to the time the said ditch was constructed and the said waters appropriated, diverted and used, as aforesaid, there was no appropriation of water made upon the said Indian Reservation, for agricultural or other purposes, excepting a small pumping plant, which was used for pumping water for use for domestic purposes, and to irrigate not to exceed eight acres of land; that said pumping plant, since the said ditch was constructed and the appropriation made as aforesaid, has been greatly enlarged, and the said plant now consists of an engine, having a cylinder nine and one-half inches inside diameter, with twelve inch stroke, at ninety pounds pressure, running at one hundred and fifty revolutions per minute, and raising water sixteen feet, and part of it fifty feet, to a tank to be used for culinary purposes. That said pumping plant is not being run continuously, and the said lands so irrigated do not require to exceed one acre foot per acre of water during the entire year, and that not more than three hundred people are supplied at the said Indian Agency with water for domestic and culinary purposes.

That there are springs and other streams upon the said reservation sufficient to supply stock pastured thereon, and that the stock pastured upon said reservation seldom go

to the said Milk River to drink.

That the said appropriation, mentioned in the complaint, claimed to have been made by the complainant, in the year 1898, is through a ditch about eighteen feet wide, two and one-half feet deep, with a fall of about nine inches to the mile, and, according to deponent's best information and belief, the said ditch has not any branches or laterals, excepting one, and only a small amount of land is irrigated thereby, and only a small amount of water is applied to any beneficial use or purpose.

That the said Milk River, above the said reservation, is fed by numerous tributaries, and that long since the canal was constructed by the Cook's Irrigation Company, and the said water appropriated, diverted and used, as hereinbefore set forth, divers and sundry persons and corporations have, on the said tributaries and on the main stream of said Milk River, constructed dams and ditches, and diverted, appropriated and conveyed, and still continue to divert, appropriate and convey large quantities of said waters of said tributaries and said Milk River, in excess of firteen thousand (15,000) inches, and thereby prevent the same from flowing down said stream, which said persons and corporations are not parties to this suit, and that a large portion of the waters flowing through the said North Fork of said Milk River, which of right belong to the said Cook's Irrigation Company, and its stockholders, and which are now permitted to flow down the said stream, on account of the injunction herein, are taken up and used by some of the said subsequent appropriators, and do not reach the said reservation."

After the reading of these affidavits the plaintiff introduced as a witness W. R. Logan the Indian Agent, who testified substantially (Tr. p. 80) that the waters from Milk

River are used upon the said Reservation for household, culinary, domestic and irrigation purposes; that there are two pumping plants in operation, one supplying the agency proper with water for household, domestic and irrigation purposes, constructed in 1889, with a capacity of 100 inches, the other supplying the schools and other buildings constructed in 1893, with a capacity of 150 inches. That in 1898, the Government commenced to construct a canal tapping the waters of Milk River for the purpose of conducting the water upon the Reservation for irrigation purposes, and this canal was now about eleven miles long and had been in operation since the year 1898, and that at this time they were irrigating approximately five thousand acres of land. That there are upon the Reservation approximately about thirty thousand acres of land which are susceptible of irrigation through the said canal; that the present necessities of the said Indians require at least five thousand inches of the waters of said stream.

Upon granting the injunction order appealed from the court filed a memorandum of its opinion (Tr. p. 83, et seq.) to the effect that when the Indians made the treaty granting to the United States lands not embraced within the Reservation, they reserved the right to the use of the waters of Milk River, at least to an extent reasonably necessary to irrigate the lands retained in the Reservation, which right so reserved continues to exist against the United States, and its grantees, as well as against the State of Montana and its grantees. And that patents, if any, that have been issued by the Land Department for lands held by the defendant, are subject to the treaty and the defendants can acquire no rights to the exclusion of the reasonable needs of the Indians, which needs, as appear to the Court, were five thousand inches.

The laws of Montana with reference to the appropriation of water in force during the period of time covered by this controversy are as follows: (Compiled Statutes of Montana, Fifth Division, p. 995.)

"Sec. 1250. The right to the use of running water flowing in the rivers, streams, canyons, and ravines of this territory, may be acquired by appropriation.

Sec. 1251. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

Sec. 1252. The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

Sec. 1253. The water appropriated may be turned into the channel of another stream and mingled with its waters, and then be reclaimed; but, in reclaiming it, water already appropriated by another must not be diminished in quantity, or deteriorated in quality.

Sec. 1254. As between appropriators the one first in time is first in right.

Sec. 1255. Any person hereafter desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:

First. The number of inches claimed, measured as hereinafter provided.

Second. The purpose for which it is claimed and place

of intended use.

Third. The means of diversion, with size of flume, ditch, pipe, aqueduct, in which he intends to divert it.

Fourth. The date of appropriation.

Fifth. The name of the appropriator.

Within twenty days after the date of appropriation the appropriator shall file with the county recorder of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion on such stream with reference to some natural object or permanent monument. The recorded notice shall be verified by the affidavit of the appropriator, or some one in his behalf, which affidavit must state that the matters and things contained in the notice are true.

Sec. 1256. Within forty days after posting such notice the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this chapter.

Sec. 1257. A failure to comply with the provision of this chapter deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions

of this act, the right to the use of the water shall relate back to the date of posting the notice."

These sections were originally a part of the Act of the Legislature of the Territory of Montana, March 12, 1885, and have since been carried in to the codification of the laws of the State of Montana in force July 1, 1895, as sections 1880 to 1888, both inclusive, of the Civil Code of the State of Montana.

## ASSIGNMENT OF ERRORS.

The appellants assign as error upon this appeal the following, to-wit:

The Circuit court erred in making the interlocutory order granting an injunction in this case for the following reasons:

1. The said Circuit Court erred in holding that by the treaty made and entered into the first day of May, 1888, between the United States and the Indians residing upon the Fort Belknap Indian Reservation, there was reserved to the said Indians the right to the use of the waters of Milk River to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty, and that by the said treaty there was reserved to the said Indians the right to the use of said waters at all.

2. The said Circuit Court erred in holding that the reservation of the waters of Milk River, if any, contained in the treaty of May 1, 1888, entered into by the United States, to the Indians residing upon the Fort Belknap Reservation, was binding upon respondents or any of them so as to affect the rights of the respondents to the use of the waters of the tributaries of said Milk River based upon acts of appropriation done and had in pursuance to the laws of the United States, the laws of the State of Montana and decisions of its courts, and the customs of the

country.

3. The said Circuit Court erred in holding that the rights of the Indian living upon said reservation to the use of the waters of Milk River were superior to the rights of the respondents or either of them, for the reason that the proof showed affirmatively and without contradiction that the respondents and each of them had diverted, appropriated and applied to a useful purpose the waters of the said river or its tributaries, according to the laws of the United States, the laws of the State of Montana and decisions of its courts, and customs of the country to the extent claimed by them, and there was no proof showing that there had ever been an appropriation of the said waters or any thereof according to the said laws, decisions and customs by the said Indians, or on their behalf.

4. The said Circuit Court erred in holding that the Indians residing upon said reservation, or the United States for their use and benefit, were entitled as against these respondents or either of them to the prior right to the use of 5,000 inches of the waters of Milk River, or to the prior right to the use of the said waters at all.

ARGUMENT.

The questions presented by these several assignments of error may be briefly stated thus:

1. Whether the United States has any, and if any, what rights as a riparian owner to the waters of Milk River as against appropriators under state laws.

2. Whether the rights of an appropriator of water under the laws of the State of Montana are not superior to those of a person, corporation or government, not appropriating in compliance with those laws.

3. Whether there was any reservation in the treaty with the Indians of the waters of Milk River for the use

of the Indians on the Belknap Reservation.

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Has the United States any rights in the waters of Milk River as a riparian owner, and if so what?

It cannot be said that the United States in its governmental capacity, as between it and its citizens is the riparian owner of the waters in a stream. As between it and a foreign nation it may be a riparian owner as to the waters in the streams forming the boundaries of its territory. As to its citizens, prior to the time of settlement and grant of its lands, it is the absolute owner of both land and water.

Story vs. Woolverton (Mont.) 78 Pac., 589.

Questions of title to either land or water therefore is determinable by grant. If the United States has not granted away the use of the waters of Milk River, it is still the owner thereof and can control the flow without reference to the needs of the Indians or of these appellants. The rights are determinable solely with reference to the grants of the land and water, and the common law doctrine of riparian ownership, as it was applied between private owners of land has nothing to do with the question at issue, which arises between the United States and its citizens and grantees. Nor can it be said that the United States as guardian of the Indians is entitled to exercise the rights of a riparian owner. The Indians are not the owners of the lands included within the Reservation. They are merely occupants of lands owned by the United States, set apart and reserved for their use. Their occupancy of the lands does not add to or take away from the title of the United States.

As early as 1823, Chief Justice Marshall, in the case of Johnson vs. McIntosh, 8 Wheaton, 543, said: "It has never

been doubted that either the United States, or the several states had a clear title to all the lands within the boundary described in the treaty (with Great Britain) subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it. * * * * The magnificent purchase of Louisiana was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet any attempt of others to intrude into that country would be considered as an aggression which would justify war. The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise."

From that decision down to the present day there has been no modification of the rule that the Indian tribes within the United States are domestic, dependent nations, or rather wards of the Government. They have merely the right of occupancy of the lands and the United States may dispose of the fee thereof as it sees fit.

United States vs. Kagama, 118 U. S. 379.

Raff vs. Burney, 168 U. S. 221.

Butz vs. Northern Pacific Railroad Co., 119 U. S. 66.

Spalding vs. Chandler, 160 U. S. 403.

Beacher vs. Witherbee, 95 U. S. 517.

United States vs. Cook, 19 Wallace, 591.

In Caldwell vs. Robinson, 59 Fed. 653, on page 654, Beatty, Judge, said:

"From the Mississippi River to the South Sea, the country was claimed by an absolute title by the Governments of France and Spain. Their title passed to the United States by treaties with France in 1803, and with Spain in 1819. The only right ever conceded to the Indians was that of occupancy, which has generally proven to be the merest shadow of a right when it became inconvenient to the dominant race."

In United States vs. Alaska Packers' Ass'n, 79 Fed., 152, on page 156, Judge Hanford said:

"The treaties made with the several Indian tribes are not to be regarded as conveyances of the title to lands in Washington Territory, from the Indians, as proprietors, with limitations and reservations of easements. The Government of the United States does not deraign title to its public lands from the Indians. The National Government is the primary source of title, and, as original proprietor, it had the power to dispose of public lands, even within an Indian Reservation, without the consent of the Indians."

In determinng the right to the waters of Milk River of appellants, all of whom are grantees from the United States, the local laws, rules and customs must govern in the interpretation of the grants. Grants of the government for lands bounded on streams and other waters without any reservation or restriction of terms are to be construed as to their effect according to the law of the state in which the lands lie.

Hardin vs. Jordan, 140 U. S. 371.

In this case Mr. Justice Bradley cites with approval the opinion in the case of Middleton vs. Pritchard, 4 Ill., 510,

in which it was said "The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law and rules adopted by each local government, where the land may lie." Concluding, Mr. Justice Bradley says: "In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie."

Whitaker vs. McBride, 197 U. S. 510.

Grand Rapids & I. Ry Co. vs. Butler, 159 U. S. 87.

As to the rights attaching to lands within the territorial limits of the state, whatever has become a settled rule of real property by the decisions of its courts is conclusive on this court.

Lowndes vs. Town of Huntington, 153 U. S. 1.

In St. Anthony Falls, W. P. Co. vs. Board of Water Comrs. 168 U. S. 349, Mr. Justice Peckham, after laying down the rule that the rights of riparian owners are to be determined by state laws and decisions, says "This principle we think has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original states and those which were subsequently admitted to the union under the provisions of the Federal constitution."

Under the laws of the State of Montana, the decisions of its courts, and the customs of the country the right to the use of the waters flowing in the rivers of this territory and state may be acquired by appropriation. The affidavits filed in behalf of the several defendants show that each of

them has complied with these laws and made a valid appropriation of the waters of Milk River and its tributaries claimed by them respectively and they are complying with the several requirements of the state law to maintain such appropriation. The notices of appropriation posted and filed by the respective defendants are not incorporated in the records, for the reason that, under the Statutes heretofore quoted, as construed by the Supreme Court of the State of Montana, a valid appropriation may be made by diverting the water and applying it to a beneficial use.

Murray vs. Tingley, 20 Mont., 260.
DeNecochea vs. Curtis, 22 Pac., 199.
Wells vs. Mantes, 34 Pac., 325.

It is not claimed that the United States or any one in its behalf has complied with those laws. In fact the claim is made in the Bill of Complaint that the United States has a superior right to the waters of this stream by virtue of its riparian ownership. But it is the settled rule of law of these western states that the right to water which comes from a valid appropriation of it to a beneficial use is superior to the rights of a riparian owner.

Atchison vs. Peterson, 20 Wall. 510.
Basey vs. Gallagher, Id. 670.
Clark vs. Nash, 168 U. S. 361.
Clough vs. Wing (Ariz.) 17 Pac. 453.
Austin vs. Chandler (Ariz.) 42 Id., 483.
Reno S. M. & R. W. vs. Stevenson (Nev.) 20 Nev. 274, 21 Pac. 317.
Stowell vs. Johnson, 7 Utah 215; 26 Pac. 290.
Moyer vs. Preston, 6 Wyo. 308; 44 Pac., 845.
Drake vs. Earhart, 2 Ida. 722; 23 Pac. 543.
Krall vs. United States, 79 Fed. 243; 48 U. S. App. 711; 24 C. C. A. 543.

Speake vs. Hamilton (Ore.) 21 Or. 7; 26 Pac., 856.
Isaacs vs. Barer, 10 Wash., 130; 38 Pac. 873.
Union Mill & Min. Co. vs. Ferris, 2 Sawy. 176; Fed. Cases No. 14,371.
Union Mill & M. Co. vs. Dangberg, 81 Fed. 73.

These laws, decisions of the courts and customs of the country have been recognized by the laws of the United States. The right to appropriate water on public lands was recognized by Congress in 1866.

Comp. Stat. Sec. 2339, 2340.

It is again expressly recognized by the Act of Mar. 3, 1887, as amended by the Act of March 3, 1891.

Comp. Stat. p. 1348, 1349.
Broder vs. Natoma M. & M. Co. 101 U. S. 274.
U. S. vs Rio Grande D & I. Co. 174 U. S. 690.
Gutierres vs. Albuquerque, etc. Co., 188 U. S. 545.
Smith vs. Denniff, 24 Mont., 20.

The only limitations upon the exercise of this power by the state are two, as set forth in the opinion of Mr. Justice Brewer in U. S. vs. Rio Grande D. & I. Co. supra. First, the reservation on the part of the United States of the waters necessary for the beneficial uses of government property. Second, the reservation on the part of the United States of the control of the navigable streams within the limits of the United States. Neither of these limitations affect the case at bar, except to the extent perhaps of entitling the agency to the use of waters for domestic purposes at the agency buildings. The irrigation of the Indians' lands is not a governmental function.

The very laws under which most of the defendants have acquired their titles to the lands owned by them recognize the doctrine of appropriation under the state laws. The Act of March 3, 1877, as amended in 1891, (19 Stat. 377,

26 Stat. 1096) provides that the right to the use of water by the person so conducting the same upon the desert lands shall depend upon bona fide prior appropriation, and all surplus water over and above such actual appropriation and use, together with the water of *all lakes, rivers and other sources of water* supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights. And by the Act of 1877, this Act was made specially applicable to the then territory and now State of Montana.

II.

The court in granting the order appealed from filed a memorandum of its opinion (Tr. p. 83) to the effect that when the Indians made the treaty granting to the U. S. lands not embraced within the Reservation, they reserved the right to use the waters of Milk River, at least to an extent reasonably necessary to irrigate the lands retained in the Reservation. If any such reservation is contained in the treaty it is there by implication. No express reservation is there contained. The material parts of the treaty, waiving the formal parts, are as follows:

"Whereas the reservation set apart by act of Congress approved April fifteenth, eighteen hundred and seventy-four, for the use and occupancy of the Gros Ventres, Pie gan, Blood, Blackfoot, River Crow, and such other Indians as the President might, from time to time, see fit to locate thereon, is wholly out of proportion to the number of Indians occupying the same, and greatly in excess of their present or prospective wants; and whereas the said Indians are desirous of disposing of so much thereof as they do not require, in order to obtain the means to enable them to become self-supporting, as a pastoral and agricultural

people, and to educate their children in the paths of civilization: Therefore, to carry out such purpose, it is hereby agreed as follows:

"Article I.

"Hereafter the permanent homes of the various tribes or bands of said Indians shall be upon the separate reservations hereinafter described and set apart. Said Indians acknowledging the rights of the various tribes or bands, at each of the existing agencies within their present reservation, to determine for themselves, with the United States, the boundaries of their separate reservation, hereby agree to accept and abide by such agreements and conditions as to the location and boundaries of such separate reservation as may be made and agreed upon by the United States and the tribes or bands for which such separate reservation may be made, and as the said separate boundaries may be hereinafter set forth.

"Article II.

"The said Indians hereby cede and relinquish to the United States all their right, title, and interest in and to all the lands embraced within the aforesaid Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Reservation, not herein specifically set apart and reserved as separate reservations for them, and do severally agree to accept and occupy the separate reservations to which they are herein assigned as their permanent homes, and they do hereby severally relinquish to the other tribes or bands respectively occupying the other separate reservations, all their right, title and interest in and to the same, reserving to themselves only the reservation herein set apart for their separate use and occupation.

"Article V.

"In order to encourage habits of industry, and reward

labor, it is further understood and agreed, that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, as provided for in Article III, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil, or engage in pastoral pursuits, as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time, as shall best promote the objects specified."

By the Act ratifying the treaty it is provided:

"Sec. 3. That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain."

It will be noticed that by Article II of the treaty the Indians expressly cede and relinquish all their right, title and interest in and to all the lands embraced within the limits of their former reservation, not included within the limits of the present reservation. Also, that the Act of Congress ratifying the treaty, expressly provides that the lands to which the right of the Indians is extinguished under the foregoing agreement, are a part of the public domain of the United States, and are open to the operation of the laws relating to homestead entries, and the laws governing the disposition of coal mines, desert lands and mineral lands. These provisions are in conflict with and pro-

hibit any implied reservation of the use of the waters. When the Indians ceded all of the lands to which they had formerly claimed title, except those contained in the reservation, they relinquished all claim to the waters flowing in the streams through them, unless they expressly reserved such waters. When the Congress declared the lands to which the Indian title had been extinguished to be a part of the public domain, the water of *all the lakes, rivers and other sources*, unless expressly reserved, became subject to appropriation under the terms of Act of Congress March 3, 1877, as amended in 1891. All of the appropriations set forth in the affidavits of the defendants were made upon streams outside of the limits of the Indian Reservation, and were made upon streams which were included as a part of the public domain thus thrown open to settlement, and were made to be used upon lands thus thrown open to settlement, the title to which could not be acquired from the United States, except upon condition of appropriation of these waters.

There is no reservation contained in the grant given by the Government to appropriate water on a public domain. No authority is given to any department or officer to suspend the operation of that grant, or to withdraw it as to any land or locality. The Government did not reserve any right as riparian proprietor or otherwise which it can assert against any person who appropriates water upon the public domain, or water that flows through or past lands owned by the Government. The Government having the absolute title and right to dispose of all its lands including the lands within the Fort Belknap Indian Reservation, had authority to grant the right of appropriating water upon those lands and upon the reservation. No reservation or restriction having been made, the Govern-

ment cannot now, after these defendants have accepted the grant, acquired vested rights and expended a large amount of money in improving their lands, enjoin them from using the waters which they have appropriated. If it was intended to prohibit the settlers upon the riparian lands of Milk River and its tributaries from diverting and appropriating water to reclaim the desert lands and to provide that the waters of Milk River should be permitted to flow undiminished in quantity past the Indian Reservation, it was useless to restrict the Indians to the reservation as now defined, because the balance of the land would be worthless without water. The Act of Congress throwing open to settlement the land purchased from the Indians became a nullity, for the reason that the lands were not capable of being settled under the laws applicable to them without the use of the water.

It was contended in the court below that the waters of Milk River, so far as the same are a part and portion of the Fort Belknap Indian Reservation and needed upon said reservation for domestic and agricultural purposes, never were and never became public waters subject to appropriation by any person under state or federal laws. This proposition may be true so far as it is applicable to the case of an appropriator who is required to go upon the reservation for the purpose of appropriating waters there flowing. But it can have no application to the lands and waters claimed by these defendants for the reason that the treaty expressly ceded and relinquished to the United States all of the right, title and interest of the Indians in and to these identical lands, and the Act accepting and ratifying the treaty threw these lands open to settlement as a part of the public domain, and all the laws applicable to the public domain became immediately applic-

able to the territory thus thrown open to settlement.

It was also contended in the court below that this treaty should be construed most favorably to the Indians, and that it should be construed, not according to the technical meaning of its words, but in the sense in which the words would be naturally understood by the Indians. This principle might be true when applied to certain class of controversies. The controversy here is not between the Government of the United States and trespassers upon the Indian Reservation. In controversies of that characer it is customary and proper to construe these treaties and conventions most strongly in favor of the Indians. Here the controversy is between the United States, either in its governmental capacity or as guardian of the Indians, and the defendants who are citizens and grantees of the United States, and the controversy has reference to the titles granted by the United States to them. In such case the defendants are the public in whose behalf the grants must be construed most strongly. The property granted to them by their entry upon and settlement of the public lands of the United States, and the appropriation of the waters flowing in the streams adjacent thereto pursuant to the laws, decisions of the courts, rules and customs of the country, is property of which they cannot be deprived without due process of law, and without just compensation. These lands, after the Indian title had been extinguished, were thrown open to settlement and occupation, and the right of the state to provide for the appropriation of waters from the streams flowing over them was granted by Congress without any reservation of the flow of the waters in Milk River for the use of the Indian Reservation, or for any other governmental purpose. The defendants entered upon these lands in reliance upon these grants,

settled thereon, and have expended large sums of money in the perfection of their title to the lands and water. To take these rights away from them, and to destroy them as is attempted to be done in this case, is the taking of private property without any compensation. This the court will not do, nor will it construe a statute or treaty to have the effect of doing this act without such being the express terms of the statute or treaty.

The court below based his conclusion upon the intention of the parties to the treaty as derived from a construction of all of its terms. He says: "This construction of the treaty seems to me to be in accord with the rules which the Supreme Court has repeatedly laid down in arriving at the true sense of treaties with Indians," citing United States vs. Winans, 198 U. S. 371.

With all due deference to the opinion of the court it seems to us that a careful consideration of the decision in the case of the United States vs. Winans with reference to its facts will disclose that that decision recognizes the proposition for which we are here contending. In that case there was being considered a treaty in which the Yakima Indians ceded, relinquished and conveyed to the United States all of their right, title and interest in and to the lands and country occupied and claimed by them, reserving from the lands ceded for their own use the tract of land therein described. Article III of the treaty provided in its second paragraph as follows: "The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them, together with the privilege of

hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

Construing this, Mr. Justice McKenna says: "At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands, and to define rights outside of them.

"The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words 'the right of taking fish at all usual and accustomed places *in common* with the citizens of the territory," confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the state, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership."

After reviewing the findings based upon the evidence to the effect that the defendants as owners of land had excluded the Indians from their fishing places, the court reviewing the decision of the court below says: "In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more. * * * The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they

breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted. * * * There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the territory' * * *" "The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they *possessed* as 'Taking fish at all usual and accustomed places.' "

It will be noticed that the court is here dealing with the construction of a treaty containing a reservation framed in clear and definite terms, whereas, in the treaty in controversy there are no terms applicable to the rights of appropriation at all The construction of the treaty in the Yakima case is made to turn upon the proposition that the Indians possessed and enjoyed these larger fishing privileges long prior to the making of the treaty, and that they were reserving those privileges to themselves. In the case at bar, at the time of the making of the treaty the Indians were not engaged in agriculture, and no water had ever been appropriated or diverted from Milk River for the purpose of irrigation upon the reservation, or for any other purpose whatsoever. The right to irrigate their lands was not a right possessed by the Belknap Indians at the time of the making of the treaty, nor was it a right which the Indians had ever claimed or exercised. In fact it can-

not be seriously contended that the Indians at the present time are desirous of irrigating their lands or converting them to the purposes of agriculture. The irrigation and cultivation of the Indian lands is a policy of the Indian Department, and not a practice of the Indian races. In the Yakima case the court was dealing with the reservation of the ancient rights and privileges of the Indians. In the Belknap case you are dealing with the policy of the Department which is directly opposed to the entire history, tradition and tendency of the Indian races. In the Yakima case the court was construing express words. In the case at bar the contention of the government calls for the reading into the treaty of an intention which never existed in the minds of the Indian tribes occupying the reservation.

In the Yakima case the court construed the terms "rights of fishery" to mean the rights as enjoyed and exercised by the Indians from time immemorial. In the Belknap case you are asked to construe "Agricultural pursuits", to mean the practice of agriculture, not as pursued by the Indians, but as developed by the scientists of modern times. Such a construction may be for the best interest of the Indian, but it takes a flight of the imagination to conceive of this idea being in the minds of the Indian signatories to this treaty. In the Yakima case the court construed express words so as to preserve for the Indians a right which they had always possessed, and which they could continue to exercise without any great injury to the lands thrown open to settlement by them. In the Belknap case you are asked to read into the treaty an intention to confer upon the Indians a right which they had never exercised, did not then claim, and would not now

exercise but for governmental compulsion, and which when exercised would destroy the value of every acre of land ceded by them to the United States, and lay waste thousands and thousands of acres made fertile by the labor and expenditure of settlers who had gone upon them under express authority from the government. Mr. Justice McKenna says "How the treaty in question was understood may be gathered from the circumstances." This is a rule well settled in its application to the construction of all written instruments. But it does not overturn express words. It is only when ambiguous words are used that it is invoked. Here there are no ambiguous words upon which the circumstances can throw light. The cession is of all of the right, title and interest of the Indians in the lands thrown open to settlement. Can it be said that the circumstances of the case requires a court of justice to imply a limitation upon that grant which would destroy its most valuable element?

III.

But the question involved in this controversy is not an open one in this court. It is the same question as was presented in the case of Krall vs. United States, 79 Fed., 241, 24 C. C. A. 543, in which it was held that the right of appropriation applies to the waters of non-navigable streams flowing through the public lands and the previous establishment of a government reservation below the point of appropriation does not affect the right, except so far as the waters of the stream have been previously appropriated for the use of such reservation. This decision has never been reversed or modified and stands as the law of this circuit applicable to this controversy.

We therefore respectfully submit that the order appealed from should be reversed and the cause remanded.

B. PLATT CARPENTER,
E. C. DAY,
STEPHEN CARPENTER,
JAMES A. WALSH,
C. C. NEWMAN,
R. E. O'KEEFE,
Solicitors and of Counsel for Appellants.

No. 1243.

IN THE

# United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

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HENRY WINTERS, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

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BRIEF OF THE APPELLEE.

---



CARL RASCH,

United States Attorney.

Naegele & Co., Printers, Helena, Montana.

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## BRIEF OF THE APPELLEE.

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I.

This suit involves the right of the United States, the appellee, and of the Indians residing upon the Fort Belknap Indian Reservation, to the use of the waters of Milk River, for useful and beneficial purposes upon the reserve. The Ft. Belknap Indian Reservation was established by the treaty or convention between the Government of the United States and the Indians of May 1, 1888, (25 St. at L. 124), and comprises an area of about fourteen hundred square miles, or approximately one million

acres of land. The greater portion of this is grazing land, and "well adapted to stock raising", (29 St. at L. p. 351), however large and extensive tracts are likewise suitable and well fitted for agriculture, and of the latter, "approximately about 30,000 acres are susceptible of irrigation with the waters of Milk River," (Tr. p. 82). But little water is to be found upon the reservation itself, and this scarcity of water, "renders the pursuit of agriculture difficult and uncertain". (29 St. at L. 351). The center of Milk River is the northern boundary line of the reserve throughout its entire width (25 St. at L. p. 124), and this stream is the only source of supply for the various uses of the Government and the Indians at the agency and for irrigating purposes generally on the reserve. Since 1889 and 1890, a portion of the waters of the stream have been continuously used by the Government and the Indians for household, domestic and irrigating purposes at and near the agency proper, and this is the only source of supply from which to satisfy their requirements and necessities at that place, (Tr. p. 9-10; p. 80-81); and since the year 1898, water has been taken from Milk River by means of a canal, and used on the reservation for the purpose of irrigating the cultivable lands susceptible of irrigation with the waters of that stream. (Tr. pp. 9-10-11). At the present time "approximately five thousand acres of land are being irrigated upon said reservation, for the purpose of producing thereon crops of hay, grass, grain, and vegetables, with waters diverted

by means of said canal and lateral ditches, distributing said waters from said canal over the lands". (Tr. pp. 81-82). This canal has a carrying capacity of at least five thousand inches of water, (Tr. p. 82); and at least five thousand inches of the water of Milk River are required for the present needs and requirements of the Government and the Indians for household, domestic, agricultural and irrigating purposes on said reserve. (Tr. p. 82). Besides stock raising, principally horses and cattle, has always been, and is now, extensively carried on by the Indians everywhere on the reserve, in fact "the main reliance of these Indians for self-support is to be found in cattle raising", (29 St. at L. p. 351), and the stock, ranging and feeding in the northern portion of the reserve, all along the channel of the stream from the eastern to the western limits of the reserve, must depend principally upon Milk River for drinking water, (Tr. pp. 12-13). At the time of the institution of this suit, not a drop of water reached any part of the reservation, but the same having been diverted by the defendants, the Government and the Indians were deprived not only of the water necessary for agricultural and irrigating purposes, but of all water which was needed for their household and domestic wants, which resulted in actual suffering and distress. (Tr. pp. 14-17).

The diversion of the waters of the stream by the defendants, as alleged in the bill of complaint, is admitted, but they seek to justify their acts on the ground

that the waters of the stream in question were legally and properly appropriated by them, and each of them, for a beneficial and useful purpose, under the laws of the State of Montana, authorizing the appropriation of the waters of the stream within that state for household, domestic, agricultural, irrigating and other proper purposes, as the same are sanctioned, recognized, and confirmed by the Federal statutes. Their position, therefore, in this controversy is that of *appropriators of water*, and the rights relied upon and asserted by them are those, and those only, that enure to appropriators of water under state and federal laws.

We assert here, the same as we contended upon argument in the court below, that the waters of Milk River, being a part and portion of the Ft. Belknap Indian Reservation, and needed upon said reservation for domestic, agricultural, irrigating and other proper and useful purposes, *never were*, and *never became* public waters subject to appropriation by any person under state or federal laws.

It is firmly settled and established that the doctrine of appropriation, under state statutes, recognized and protected by Section 2339 of the U. S. Revised Statutes, applies only to the public lands and waters of the United States.

Smith vs. Denniff, 24 Mont. 20; 50 L. R. Ann. 737.

3 Farnham on Waters, Sec. 659.

Curtiss vs. Water Co., 10 L. R. Ann. 484.

Benton vs. Johncox, 39 L. R. Ann. 107.

Taylor vs. Abbott, 37 Pac. 408.

Cruse vs. McCauley, 96 Fed. 369.

Sturr vs. Beck, 133 U. S. 541.

17 Am. and Eng. Ency. of Law, 2nd Ed. p. 507.

And it is equally well settled that:

"Whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the public lands, and that no subsequent *law*, *proclamation*, or *sale* would be construed to embrace or *operate* upon it, although no reservations were made of it."

Wilcox vs. Jackson, 13 Pet. 498.

Leavenworth R. R. Co. vs. U. S., 92 U. S., p. 740 et seq.

R. R. Co. vs. Roberts, 152 U. S. 117, 118.

U. S. vs. Carpenter, 111 U. S., 347.

Spalding vs. Chandler, 160 U. S., 394.

Kinney on Irrigation, Secs. 133, 124.

Apis vs. U. S., 88 Fed. 931.

Prior to 1855-1856, in fact at all times prior to the enactment of any law recognizing the right of approp-

riation, all of the country now embraced within the State of Montana, was Indian country. By Article 4 of the treaty of October 17, 1855, proclaimed April 25, 1856, there was established and reserved to the Ft. Belknap Indians and other Indian tribes, as and for their home and abiding place, practically all that part of the state lying north of the Musselshell River and extending from the crest of the main range of the Rocky Mountains eastward approximately to what is now the western boundary line of the Fort Peck Indian Reservation.

Revision of Indian Treaties p. 7; 11 St. at L. p. 658.

By the terms and provisions of this treaty the Fort Belknap Indians reserved to themselves the

> "uninterrupted privileges of hunting, *fishing*, and gathering fruit, grazing animals, curing meat and dressing robes."

Article 3, of the Treaty.

And the territory so set apart and reserved to them at that time, embraced the channel and waters of Milk River from its source to its mouth lying within the confines of the United States.

This continued to be the place of abode of these Indians until 1874, at which time their territory was reduced, so as to embrace, roughly speaking, all that part of Montana lying to the north of the Missouri River and

extending from the Rocky Mountains eastward to the Dakota boundary line, including Milk River.

Act of April 15, 1874; 18 St. at L. p. 28.

The tract, so set apart, remained Indian country, and the Indian Reservation of these Indians, until 1888, at which time the present Ft. Belknap Indian Reservation was carved out of the larger reserve established in 1874, as their "*permanent home*", with the center of Milk River as the northern boundary line of the reservation, and which is now its northern boundary line.

Act of May 1, 1888; 25 St. at L. p. 124.

It is clear, therefore, that no part of the territory now contained and embraced within the boundary lines of the Ft. Belknap Indian Reservation, ever was or became public land. And it is palpable that no part or portion of the lands and the property rights appurtenant thereto, embraced and constituting a part of said reservation, ever became subject to any "*law*, proclamation or *sale*" concerning or of public lands, and no law, proclamation or sale relating to, or of, public lands, could be in any manner construed to embrace or operate upon any portion of the Ft. Belknap Indian Reservation.

As stated by the Supreme Court of the United States in Leavenworth R. R. Co. vs. U. S., 92 U. S. on p. 742:

> "As long ago as the Cherokee Nation vs. Georgia, 5 Pet. 1, this court said that the Indians are acknowledged to have the unquestionable right

to the lands they occupy, until it shall be extinguished by a *voluntary cession* to the government; and recently, in United States vs. Cook, 19 Wall 591, that right was declared to be *as sacred* as the title of the United States to the fee. * * * With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe *against intrusion*, if the government discharged its duties to them."

And, after quoting from Wilcox vs. Jackson, 13 Pet. 498, to the effect that:

> "Whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the public lands; and no subsequent law, proclamation, or sale would be construed to embrace or operate upon it."

the court proceeds to say that this doctrine:

> "Applies with *more force to Indian* than to military reservations. The latter are the absolute property of the government; in the *former* (Indian reservations), *other rights are vested*."

And so in R. R. vs. Roberts, 152 U. S. pp. 117-118, the court said:

> "It has always been held that the occupancy of lands set apart *by statute* or *treaty* with them (the Indians) for their use, cannot be disturbed by claimants *under other grants* of the government. And

> the setting apart *by statute* or *treaty* with them of lands for their occupancy is held to be of itself a withdrawal of *their character as public lands*, and consequently of the lands from sale and preemption."

And such withdrawal or reservation, by statute or treaty, is, as said by Judge Field in U. S. vs. Carpenter, 111 U. S. 347:

> "Notice that the land" (and the "*whole*" thereof, See concluding part of opinion)—"will be retained by the government for the use of the Indians, and this purpose cannot be defeated by the action of any officers of the land department."

It follows from this that the waters of Milk River never were or became public waters upon which the statutes conferring the right of appropriation could operate. The Indians and the government, acting together for the accomplishment of a certain well defined object or purpose, reserved to themselves,—the Government to itself and the Indians, the Indians to themselves, —one half of the stream, *in corpore*, as it then existed, as a part and parcel of the Ft. Belknap Indian Reservation. But this was not all. As riparian owners, the treaty establishing the reservation *ex proprio vigore* attached to it, as a further and additional part and portion of said reserve, and reserved to the parties, all the rights incident to and growing out of the status of ripar-

ian proprietorship. It reserved to them their riparian rights to *all of the waters of the stream.*

> "Riparian rights are those which attach to the ownership of land through, or past which, a river runs."

24 Ency. of Law, 2nd Ed., p. 978.

Kinney on Irrigation, Sec. 55.

And

> "these rights are not easements or appurtenances, but are inseparably annexed to the land and *a parcel of the land itself*, they have been designated as natural rights and are said to exist *jure naturae*. They are as much a part of the *soil as the stones scattered over it.*"

30 Ency. of Law, 2nd Ed., p. 352.

Angell, Water Courses, Sec. 5.

Schwab vs. Beam, 86 Fed. on pp. 42-43.

Benton vs. Johncox, 39 L. R. Ann. on p. 109.

In the words of the Supreme Court of the United States in Leavenworth R. R. Co. vs. U. S., 92 U. S. on page 747:

> "The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein, and had title thereto. In one sense, they were reserved to the Indians; but, in

another and broader sense, to the United States, for the use of the Indians."

In conclusion of the discussion upon this point, we quote from the cases of United States vs. Rio Grand Dam and Irrigation Company, where the Supreme Court of the United States, in considering the congressional legislation, which recognizes and sanctions the right to appropriate water, defines the operative effect of this legislation, and expressly limits and confines it to the public lands, as follows:

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. * * * While this is undoubted, and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a state may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. * * * Yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

It then quotes the Act of July 26, 1866, which is Section 2339 of the Revised Statutes of the United States, and says:

> "The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water."

And then, after quoting from Broder vs. Natoma Water and Mining Co., 101 U. S. 274, and the Acts of March 3, 1877, commonly known as the "Desert Land Act", and the Act of March 3, 1891, granting the right of way over and through government reservations for canals and waterways, which comprises all the laws of Congress bearing on the subject of appropriation, the Court proceeds as follows:

> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. * * * This legislation must be interpreted in the light of existing facts—that all through this mining region in the west were streams not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all those cases of purely local interest the obvious purpose of Congress was to give its assent, *so far as the public lands were concerned*, to any system, although in contravention

of the common-law rule, which permitted the appropriation of those waters for legitimate industries."

Approved in:

Gutierres vs. Albuquerque L. & I. Co., 188 U. S. 545 on p. 554.

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II.

This brings us to a consideration of the rights of the Government as a riparian proprietor, or, as the proposition is somewhat too broadly stated by the counsel for the appellants: "Whether the United States has any, and if any, what rights as a riparian owner, to the waters of Milk River as against appropriators under state laws." And here again we submit, as we urged in the court below, that the United States is now and always has been a riparian proprietor of the waters of Milk River, and as such riparian proprietor it has the absolute and unquestionable right to have the waters of the river flow down the natural channel of the stream to supply its requirements and necessities there for domestic, agricultural and irrigating purposes, in order to fully and effectually carry out the objects and purposes for which the reservation was established.

And here we desire to point out, in the first place, that we are not now concerned with the question of the

rights of riparian owners as against the rights of appropriators "under state laws" generally, but only as recognized and defined under the laws of the State of Montana, as the same are construed and interpreted by its highest court. Nor is it in this case at all necessary to inquire or discuss, whether, as apellants' counsel express it, the United States, "*in its governmental capacity,* as between it and its citizens", can be said to be the riparian owner of the waters of the stream, because the rights of the United States, incident to the ownership of "public lands" generally, "*in its governmental capacity*",are not involved in this controversy. On the contrary, the rights of the Government here to be determined are those incident to and growing out of the ownership of lands held and used by it in the character of a private or proprietary owner of a tract of land bordering on a stream, reserved, set apart, and appropriated for a particular purpose. This purpose was to give "*permanent homes*" to these Indians, and all the rights attached to and connected with the lands reserved, ex vi termini enured to the Indians, and they cannot now be deprived of any of them, nor can they be terminated or extinguished except by a voluntary cession by them to the federal government.

Kinney on Irrigation, Sec. 133.
R. R. Co. vs. U. S., 92 U. S. 733.

Any one owning lands bordering on a stream is a riparian proprietor, and speaking generally of the rights

of the government as the owner of such lands, whether held or owned by it as public lands, or as private, reserved, or proprietary lands, it has at least,

> "the same property and right in the streams flowing through them as any other proprietor would have."

Long on Irrigation, Sec. 26.

Union Mill & Mining Co. vs. Ferris, 2 Sawyer 176.

Krall vs. U. S., 79 Fed. 241.

Cruse vs. McCauley, 96 Fed. on p. 373.

Gould on Waters, p. 240.

Considering then, for the purpose of the argument, the riparian rights of the complainant from the standpoint of an ordinary riparian proprietor, we most cheerfully concede the correctness of counsel's position (Appellants' Brief p. 30),

> "that the rights of riparian owners are to be determined by state laws and decisions",

and we as readily also agree with them in their contention that:

> "As to the rights attaching to lands within the territorial limits of the state, whatever has become a settled rule of real property by the decisions of its courts is conclusive on this court".

Appellants' Brief, p. 30.

And from this it follows, as stated in Kinney on Irrigation, that:

> "Whatever may be the rules adopted by the statutes and decisions of any particular state with reference to the rights of riparian owners and appropriators, still that doctrine, heretofore described as originating from the local customs of miners and sustained by the legislation of Congress, is confined in its operation to the public domain of the United States, *and all extensions of this doctrine to other lands and other proprietors*, and all additional rules, *must necessarily proceed from the states themselves*".

Kinney on Irrigation, Sec. 145, pp. 220-221.

Citing: Pomroy's Riparian Rights, Sec. 30.

What, then, are the laws and decisions of the courts upon the subject of water rights in the State of Montana?

In Montana the settled law governing the acquisition of a water right, and the right to the use of water within that state, is, in a sense, *sui generis*. Of course, it is clearly established that a right to the use of water for any useful and beneficial purpose may be acquired by appropriation, but this method of obtaining a water right is confined

> "to the public domain owned by the United States",

and by statutory enactment it has been extended to

> "water on the *unsold* state lands."

In all other cases,

> "the right to the use of running water is a corporeal right or hereditament which *follows or is embraced by the ownership of riparian* soil. It is a corporeal right running with riparian lands".

And when it is sought to obtain the right to the use of waters where riparian rights have attached, it can

> "be acquired only by the grant, expressed or implied, of the owner of the land and water".

And

> "where the absolute title to riparian soil on a stream has passed from the United States before any right to the water by prior appropriation has become vested in any person, *no such right can be acquired afterwards under the grant of Congress;* and the common-law rule as to the right of riparian owners would apply, were it not for the fact that the State of Montana has by *necessary implication assumed to itself* the ownership, *sub modo*, of the rivers and streams of this state and, by Secs. 1880 et seq. of the Civil Code, has expressly granted the right to appropriate the waters of such streams, which right, if properly exercised in compliance with the requirements of the statute, vests in the appropriator full legal title to the use of such waters by virtue of the grant made by this state as owner of the water. But this privilege or right to appropriate the water of a stream can in any and every case be taken advantage of or exercised only by *one who has*

*riparian rights*, either as owner of the riparian land, or through grant of the riparian owner."

With reference to rights

"acquired by appropriation and user of the water on the public domain,"

the same are

"founded in grant from the United States government as owner of the land and water,"

and

"such grant has been made by Congress".

As to the unsold state lands,

"the right is conferred by Secs. 1880 et. seq., of the Civil Code, but such permission *can and does apply only to lands owned by the state*. As owner of the stream, it has granted the right to appropriate the water of the stream, yet it does not pretend to legalize the exercise of such privilege, in violation of the vested rights of other land owners. * * * It may be remarked, *obiter*, that the common-law doctrine of riparian rights assured to each riparian owner the right to the *reasonable* use, without substantial diminution in quantity or deterioration in quality to the detriment of other riparian proprietors, of the waters of a stream flowing by or over his land. The doctrine of 'prior appropriation' confers upon *a riparian owner*, or one having title to a water right by grant from him, the right to a use of the water of a stream which would *be increas-*

*onable at the common-law*, and to *this extent* the doctrine of prior appropriation may be said to have abrogated the common-law rule".

The portions above quoted are excerpts taken from:

Smith vs. Denniff, 24 Mont. 20; 50 L. R. Ann. 737.

Now, it is undoubtedly true that Montana, at the time of its admission to statehood, might have "*assumed to itself*" the absolute ownership of the streams and waters of the state, as was the case with Wyoming, (Kinney on Irrigation, (Sec. 482), and Colorado, (idem, Sec. 556), instead of assuming it, in the language of the court, "*sub modo*", that is to say, in a qualified sense, to-wit: in every respect regardful of and subject to the vested and accrued rights of riparian owners.

The state might likewise undoubtedly have abrogated and abolished the doctrine of riparian proprietorship *in toto* by statutory enactment, rather than to the limited extent as declared by the Supreme Court of the State. But it has never done so, and it is a demonstrable fact that from the very time of the organization of the territory, and continuing on during the territorial regime, as well as under state government, the statutory law, as well as the decisions of the court, have recognized and applied the doctrine of appropriation only to the extent as defined by the Supreme Court in Smith vs. Denniff, *supra*, and at no time has there been anything either

in the laws of the Territory or of the State, or in the decisions of the court of last resort, disclosing or evincing any intention to abrogate riparian rights in favor of rights acquired by appropriation, or to subordinate the rights of the riparian owner to the rights of the appropriator.

Thus the first Territorial Legislative Assembly, on the 12th day of January, 1865, passed an act entitled, "An Act to protect and regulate the irrigation of lands in Montana Territory," the first section of which said act provided as follows:

> "That all persons who claim, own, or hold a possessory right or title to any land, or parcel of land, within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek, or river, for the purpose of irrigation, and making said claim available *to the full extent of the soil* for agricultural purposes."

And the fourth section of the act was as follows:

> "That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said

water, upon certain alternate weekly days, to different localities, as they may in their judgment think best for the interest of all parties concerned, and with a due regard to the legal rights of all."

In construing this Act in the case of Thorp vs. Freed, Chief Justice Wade of the Territorial Supreme Court, said:

"If this section of the law does not mean that there shall be an equal distribution of the waters of a stream among all the parties concerned in such water, without any regard whatever to the date of location or appropriation, then we are utterly unable to comprehend the language used. It provides that the commissioners shall apportion the water of the stream in a just and equitable manner among all the parties along the stream. Suppose one man had appropriated all the waters of a stream, and twenty other men lower down had and owned farms through which the stream ran, can it be doubted that under this statute the commissioners would have been compelled to apportion the waters of the stream among the riparian owners equally? It seems to me the question does not admit of a doubt."

Thorp vs. Freed, 1 Mont. on pp. 668-669.

Section 1, of the Act of January 12, 1865, of the Territorial Legislature, remained upon the statute books of the Territory and subsequently of the State of Montana, substantially in the same form as originally enacted, until the adoption of the Civil Code of 1895, the provisions

of *that code* upon the subject of water rights being the ones referred to and construed by the Supreme Court of Montana in Smith vs. Denniff, supra.

See also

Benton vs. Johncox, 39 L. R. Ann., on p. 111,

where a similar act of the Territory of Washington is referred to and construed.

Moreover, while the question of the rights of riparian proprietors as against those of appropriators was conclusively settled and determined under the laws then in force and existing in Montana, and set out in counsels' brief, in Smith vs. Denniff, *supra*, practically the same result had been reached and the same doctrine recognized and established as controlling in Montana by the territorial Supreme Court in the case of Thorp vs. Freed, *supra*, in 1872.

The syllabus upon this point, as prepared by the official reporter, and which is as follows:

> "WATER—appropriation for irrigation—riparian proprietors—laws of Territory and Congress relating to water rights—local customs. WADE, C. J., and KNOWLES, J., have discussed these questions in their opinions and arrived at *different conclusions*. MURPHY, J., could not act as a member of the court, and did not express any opinion at the time the case was examined. There is no opinion of the court and a syllabus of these opinions is omitted by the reporter",

is misleading and not borne out or verified by the facts. The two Judges mentioned did not arrive at "different conclusions", upon the question of the applicability and controlling force of the doctrine of riparian proprietorship in Montana, but the difference of opinion existed simply as to the conditions under, and the time at which the doctrine could be invoked and applied. While Chief Justice Wade held that the doctrine of appropriation, and any rights acquired by virtue of appropriation, could only be recognized with relation to lands so long as the paramount title remained in the general government, in other words, so long only as the lands upon which the appropriated waters were being used remained *public lands*, and that a grant by the government of riparian lands abrogated the doctrine of appropriation and all rights which might have been acquired thereunder, Judge Knowles held that, quoting from his opinion in the case on pp. 660-661:

> "Whatever rights the parties had in relation to the waters of the Prickley Pear Creek, vested before any of these parties acquired their rights to the land under the general government. This decision, it will be understood, *does not go to the extent* of allowing parties to appropriate and divert water so as to prevent the same from flowing over land *to which a party had obtained the government title after the acquisition of this title.* If no one *before the pre-emption and entry* of land by a party has acquired the right to divert the waters of a stream, *then the*

*patent from the general government conveys the water as an incident to the soil over which it flows.* If it has been appropriated before the time when the patent takes effect, it does not."

Upon this point, the views of the Chief Justice, were, quoting from his separate opinion on pp. 681-682, as follows:

"In the case before us, both plaintiffs and defendants have acquired titles to their lands from the government, and when the title passed from the government *to riparian owners,* the *rights acquired* by prior appropriations, as applied to government lands while the title is yet in the government and the occupiers are mere tenants at will, *is not applicable and falls to the ground.* Conceding the fact, that the government retains the right to the final disposition of the soil and the waters flowing over the same, and this result must inevitably follow, and each purchaser from the government, of lands along a stream, acquires all the title of the grantor, and this title carries with it property in the soil and water naturally flowing over the same. If this is not the case the prior appropriator takes title to the water as against the government.

"We therefore conclude that the doctrine, that he who first appropriates the waters of a stream can hold the same as against subsequent riparian owners, for the purposes of irrigation and agriculture, is inapplicable to lands situate along the banks of a stream where title to such lands has

passed from the government to riparian owners, for the very act of transferring the title carries with it the freehold, and this includes a title to the water that flows over or along the boundary of the lands thus transferred; and the act of congress of July 26, 1866, is not at all in conflict of this view of the case. That act is applicable to rights acquired while the title yet remains in the government, and the occupiers are mere tenants at will."

These excerpts from the two opinions of the Judges clearly show that there was no difference of views concerning the controlling force and effect of the doctrine of riparian proprietorship in the determination of questions relating to the use of waters, but, as stated before, the only difference disclosed is as to the particular circumstances under which it may be applied and given effect, and the decision of the Supreme Court of the United States in Sturr vs. Beck, 133 U. S. 541, establishes the correctness of Judge Knowles' position in the Montana case.

And that doctrine has existed and been recognized in Montana from that time to this:

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398; 50 L. R. A. 737; 81 Am. St. R. 408.

Cruse vs. McCauley, 96 Fed. 369.

Willey vs. Decker, 73 Pac. on p. 214, second column.

Long on Irrigation Sects. 10, 29, notes 35 and 36.

17 Am. & Eng. Ency. of Law (2nd Ed.) pp. 491, 485.

Having thus shown that the doctrine of riparian proprietorship, modified to the extent as defined by the Supreme Court in Smith vs. Denniff, is recognized and applied in the State of Montana, we now come to inquire as to the rights of the complainant as a riparian proprietor, considering the matter, for the purpose of the argument at this time, purely from the standpoint of riparian ownership, putting the Government in the attitude of any other riparian owner, owning and holding lands along the stream in question in private or proprietary, as distinguished from public, ownership, and without reference to other features or other elements in the case decisive of the Government's contention in its favor. It cannot, and will not, be successfully disputed that the Government always has been, and it is now, a riparian owner on the channel of Milk River, and was such before, and at the time when, the waters of said stream were appropriated and diverted by the defendants in this case. As such riparian owner, under the decision in Smith vs. Denniff, no appropriation of the waters of Milk River could legally be made to the prejudice of the complainant's riparian rights. And for the complete enjoyment of those rights, it was entitled

"to the reasonable use, without substantial

diminution in quantity or deterioration in quality to the detriment of other riparian proprietors, of the waters of the stream."

That is to say, it was and is entitled to the natural flow of the water in and down its accustomed channel, and use it for domestic purposes, and to a reasonable extent for irrigating its riparian lands.

Union Mill & Min. Co. vs. Dangberg, 81 Fed. on p. 106.

Long on Irrigation, Sec. 11.

Pomeroy Riparian Rights, Sec. 125.

Benton vs. Johncox, 17 Wash. 277; 39 L. R. Ann. on p. 112.

Isom vs. Nelson Mining Co., 47 Fed. pp. 200-201.

Hoge vs. Eaton, 135 Fed. on p. 414.

By virtue of the statutory provisions of this state, upon the subject of water rights, quoted in counsels' brief, as construed and interpreted by its Supreme Court, the rights of the riparian proprietor have been extended and enlarged so as to enable him, by appropriating and diverting, as prescribed by statute, sufficient water for that purpose, to irrigate his riparian lands "*to the full extent of the soil for agricultural purposes*", irrespective of the needs and requirements of other riparian owners, whose riparian rights, either in the limited sense of the common-law rule, or the broader sense of the statutory

provisions, as defined by the Court, had not *then* accrued or become vested.

The very Chapter of laws, concerning "Irrigation and Water Rights" in Montana, "in force", as counsel correctly states, "during the period of time covered by this controversy", and from which some sections are taken and quoted in appellants' brief, while others are, for some reason, discreetly omitted, and for reference noted as being found in "Compiled Statutes of Montana, Fifth Division, p. 995", without, however, apprising this Court of the year when these "Compiled Statutes" were in fact compiled and in force, simply informing this Court that these laws were "carried into" the Code of 1895, and the very first section of this Chapter of laws, being Section 1239 of the Fifth Division of the Compiled Statutes of Montana of 1887, at page 992 thereof, provided that:

> "Any person or persons, corporation or company, who may have or hold a title, or possessory right or title, to any agricultural lands within the limits of this territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said territory for the purposes of irrigation and making said lands available for agricultural purposes *to the full extent of the soil thereof.*"

As heretofore shown, this section, substantially in form as it appears in the compiled laws of 1887, had

been construed by the Supreme Court of the Territory as far back as 1872, as recognizing the rights of riparian proprietors, and to the same effect by the Supreme Court of Washington in Benton vs. Johncox, supra.

And again this Chapter of laws, entitled in the Compiled Statutes of 1887, "Irrigation and Water Rights", and "in force during the period of time covered by this controversy", expressly provided that the "*Chapter*" should not be:

> "So construed as to impair, or in *any way or manner* interfere with, the rights of parties to the use of the water of such streams or creeks *acquired before its passage.*"
>
> Section 1245, p. 994.

And while in controversies, respecting the right to water in the territory, the rights of the parties were to be determined by the dates of appropriation, such determinations were to be had:

> "*with the modifications heretofore existing* under the local laws, rules, or customs and *decisions of the Supreme Court of the territory.*"
>
> Section 1249.

Whenever a person becomes entitled to the use of water by virtue of his riparian proprietorship, such a right becomes a vested right to the use of the water to the extent of his requirements and necessities for domestic, agricultural, and irrigating purposes, which right to

that extent, becomes superior and paramount to every other right riparian, as well as by appropriation, subsequently initiated and obtained.

Cruse vs. McCauley, 96 Fed. 369.

And, in this connection, it is at this time unnecessary to inquire, although we shall have something to say upon that point in another place, whether the complainant, at the time of the appropriation and diversion of the waters of Milk River by the defendants, had become entitled to or vested with the right to use the waters of the stream in question to the extent warranted under the state statute, as defined by the Supreme Court of the State, or whether it was confined to the use authorized under the doctrine of riparian rights. As against the defendants it was then, at any rate, and in any event, entitled to the natural flow of the waters of the river down its accustomed channel to the place of its riparian uses, to-wit: the Ft. Belknap Indian Reservation. And no law in force in the State of Montana pretends, in the language of the Montana Court, "to legalize the exercise of the right to appropriate the water of the stream, in violation of such vested rights."

We have heretofore shown, in another part of this brief, that the lands and waters in this suit, never were or became public lands and waters subject to or affected by any law, state or federal, authorizing the appropriation of the waters found upon the public domain. But in the preceding discussion of the question of riparian

rights, we have assumed, for the purposes of the argument, that they at one time were or might have been so subject to such laws, and in the consideration of the subject of the riparian rights of the complainant, we have placed the government in exactly the same position that a private individual would occupy, seeking to protect his riparian rights in the waters of a stream, as against subsequent appropriators, as the same are recognized, established and enforced under the system of laws governing water rights in the State of Montana. We have seen that in Montana riparian rights are recognized and protected as fully and completely as the rights acquired by appropriation. And we submit that it makes absolutely no difference, for the proper determination of this suit, what particular system of laws relating to water rights may have been established in other states or districts, or what particular doctrines or principles have been enunciated by the courts of last resort in other jurisdictions as governing them. The law which controls in this case, as appellants' counsel concede, upon the question of riparian rights, is the law which prevails upon the subject in Montana.

Thus in Kinney on Irrigation, the rule of law is laid down as follows:

> "When a grantee of the United States obtains title to a tract of land through or adjoining which a stream of water runs, and the waters of a stream have not hitherto been appropriated, the grantee's

patent is not subject to any possible appropriation which may be subsequently made by another party, *unless the State or Territory in which the land is located has, by statutory enactments, abolished the common law theory of riparian rights.* If the land granted before any appropriation has been made is upon the public domain, within the boundaries of a State, the riparian rights of the grantee must be *determined and regulated wholly by the municipal law of the State*, over which Congress has no power whatever to legislate. And unless there is a State law upon the subject abolishing or modifying the common law of riparian rights within that State, subsequent appropriators of the stream must take the water subject to all of those rights of the riparian grantee."

Kinney on Irrigation, Sec. 135, p. 205; Sec. 145, pp. 220-221.

Pomeroy Riparian Rights, Sec. 30.

And that the doctrine of riparian rights has not been and never was abolished in Montana, and that the laws of that State authorizing and permitting the appropriation of water, do

"not pretend to legalize the exercise of such privilege, in violation of the vested rights of other land owners,"

has been distinctly and emphatically declared.

"As well", says the Court, "might it be said

that by reason of the game laws, permitting all persons to fish in the streams of this state, it therefore follows that anyone has a vested right to exercise this privilege whenever there is a stream, in defiance of the vested rights of the property owners, —that is to say, by reason of the game laws a landowner has no rights which a fisherman is bound to respect. The mere statement of such a proposition is a demonstration of its fallacy. It is therefore apparent that absolute legal title to a water right can only be acquired by grant, express or implied, of the riparian owner of the land and water."

Smith vs. Denniff, 24 Mont. on p. 24.

Cruse vs. McCauley, 96 Fed. 369.

This is the interpretation of the water right law of Montana by its highest court, and, as appellants' counsel themselves concede, it is binding and conclusive. As was said by Mr. Justice Field in Christy vs. Pridgeon, 4 Wall. 196, on page 203, in speaking of a law of the Republic of Mexico which had subsequently become, in effect, a local law of the State of Texas:

"The interpretation, therefore, placed upon it by the highest Court of the state must, according to the established principles of this court, be accepted as the true interpretation, so far as it applies to titles of lands in that state, *whatever may be our opinion of its original soundness.* Nor does it matter that *in the courts of other states*, carved out of the territory since acquired from Mexico, *a different*

*interpretation may have been adopted.* If such be the case, the courts of the United States will, in conformity with the same principles, *follow the different ruling as far as it affects titles in those states.*"

Cited and quoted in:

Bank of Humboldt vs. Glass, 79 Fed. 706.

To the same effect:

Walker vs. New Mexico & S. P. R. Co., 165 U. S. 593.

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III.

To permit the diversion of the waters of Milk River by the appellants would be violative of the treaties, conventions, and agreements made between the United States and the Indians residing upon the reservation, and would deprive the Indians of rights and property reserved by and secured to them under the terms of such treaties, conventions and agreements.

The learned Judge presiding in the Court below held that in his judgment, "when the Indians made the treaty granting rights to the United States they reserved the right to the waters of Milk River, at least to an extent reasonably necessary to irrigate their lands." The correctness of this conclusion has already been incontrovertibly established in the preceeding part of this brief, and that independently of and without reference to the par-

ticular terms of the treaties or conventions in question as to the objects and purposes therein referred to for which the reservation was to be used and to which the lands were to be devoted.

We have seen that riparian rights are such as attach to the ownership of land through, or past which, a stream runs, and that these rights are not mere easements or appurtenances, but are inseparably annexed to the land and a part and parcel of the land itself. And it is equally well settled, that as a part and parcel of the land, they pass with the land *without any express reservation or grant.*

Pomeroy's Riparian Rights, Sec. 152.

Benton vs. Johncox, 39 L. R. Ann. pp. 109-110.

24 Ency. of Law, 2nd Ed. p. 981 and note 8.

Schwab vs. Beam, 86 Fed. on pp. 42-43.

Long on Irrigation, Sec. 78.

17 Ency. of Law, 2nd Ed. p. 493.

Obviously counsel are therefore grievously mistaken in their contention that: "If any such reservation is contained in the treaty it is there by implication". The property and property rights that were actually and expressly reserved for the use and benefit of the Indians, by the terms and provisions of the treaty, properly construed and interpreted, included the lands and the corpus of the water within the limits of the reserve

as defined by its boundary lines, and the right to the use of the waters of the entire stream bordering on the reserve.

A consideration of the treaties, conventions and agreements between the Government and these Indians, without taking into account in the discussion of that phase of the case, any rights accruing to and vested in the United States and the Indians by virtue of riparian proprietorship as heretofore discussed and referred to, leads to precisely the same result. Prior to the 1st day of May, 1888, the entire northern part of Montana north of the Missouri River and extending from the main range of the Rocky Mountains eastward to the Dakota line, was Indian country, reserved and set apart by the treaty of 1855 and 1856, as an Indian Reservation, and the home and place of abode of the Indians whose rights are involved in this suit. By the terms of that treaty the Indians reserved to themselves the "uninterrupted privilege of fishing" in the waters of the stream, and exacted from the Government, in consideration of various concesssions made by them, financial aid "in establishing and instructing them in *agricultural* and mechanical pursuits". (Article 10 of the Treaty, 11 St. at L. p. 659.). As has been seen their territorial abiding place, as defined by the treaty of 1855-1856, was reduced by the Act of April 15, 1874, to that portion of Montana lying north of the Missouri River, and finally in 1888, separate reservations, and among them the Ft. Belknap

Indian Reservation, were, by agreement and with the consent of the various Indian tribes theretofore inhabiting the Indian country east of the Rocky Mountains, carved out of and reserved from the vast tract of what was then, and always theretofore had been, Indian country, as and for the "permanent homes" of the various tribes and groups of tribes of Indians parties to said treaty or agreement. The territorial limits of the separate reservations were narrow and confined as compared with the areas formerly occupied by these Indians in common, and all lands, so formerly occupied by them, but not included in the newly established smaller separate reservations, were *ceded* and *relinquished* by the Indians and Indian tribes to the general government. But in thus voluntarily relinquishing their property rights to so large and extensive a domain, the Indians not only declared and made known the reasons which prompted them to do so, but they also defined the objects and purposes which they had in view, and the advantages which they believed would result to them by agreeing and consenting to this new arrangement. Besides, in consideration of the cession to the United States, and the relinquishment of valuable property and property rights, they again exacted in the most deliberate, precise and emphatic manner, in return for these valuable concessions made by them to the Federal Government, the same as they had done in 1855-1856, the financial aid, and the assistance of the General Government in other respects,

for the accomplishment of the various objects and purposes which, according to the treaty or agreement, was the moving cause which actuated the Indians to negotiate with the Government, and induced them to surrender large portions of their former possessions

Now, the treaty of 1888 most clearly speaks for itself as to the causes and reasons which promted the Indians to divest themselves of these large quantities of territory, as to the objects and purposes thereby intruded to be subserved, and the result which the Indians hoped and expected to obtain. The causes were that:

> "Whereas the reservation set apart by Act of Congress approved April fifteenth 1874 * * * is wholly out of proportion to the number of Indians occupying the same, and greatly in excess of their *present* and *prospective wants*,"

the Indians, in view of that condition of affairs, plainly apparent to and recognized by them, were

> "desirious of disposing of *so much therof* as they did not require."

But they did not intend to give it away, nor did they recognize the legal or moral right in any one to take it from them. They desired to dispose of it, offered to dispose of it, and finally did dispose of it *for pay*—for a valuable consideration—intended and designed to be used for the consummation of a certain clearly expressed purpose, to wit:

"in order to obtain the means to enable them to become self-supporting,*as a pastoral and agricultural people*, and to educate their children in the paths of civilization."

And:

"Therefore, to carry out *such purpose*",

they ceded and relinquished to the United States those portions of their former reservation which were not required for their present or future wants.

25 Statutes at Large, on pp. 113-114.

This is the unequivocal language of the Indians *themselves* as to the reasons why, and the purposes for which, the cession was made. It is their own declaration as to the policy which was to govern their future course of action, and the ends which they thereby hoped and expected to attain. Does it take "a flight of the imagination", as counsel contend, to conceive that the Indians meant just exactly what they said, viz: that they desired and intended to engage in "agricultural pursuits," but needed means and assistance to enable them to do so. Is there anything in this language of the Indians, declaring their wish and intention to become producers,—self-sustaining factors in industrial life—that the rights and privileges reserved by and conferred upon them to enable them to do so, were rights "which they did not then claim, and would not now exercise but for governmental compulsion". It is undoubtedly true, as counsel say, that "the

irrigation and cultivation of the Indian lands is a policy of the Indian Department", but whatever may be the "practice" in this respect as regards other Indians, it is plain that the Indians whose rights are involved in this case have themselves unmistakably declared in favor of that very policy. And whatever rights they obtained and secured by the terms of the treaty or agreement, for the purpose of enabling them to carry out this policy and realize the objects and purposes thereby designed, should be and will be protected and enforced by and in every court of the land.

In the words of the Supreme Court of the United States in Leavenworth R. R. Co. vs. U. S., 92 U. S. on pp. 746 and 747:

> "That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government, and saved from a possible grant, is a proposition which will command universal assent. * * *
>
> "Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference in this respect, whether it be appropriated for Indian or other purposes. There is an equal obligation resting on the government to require that neither class of reservations be diverted from the uses to which it was assigned."

Now, "in consideration of" this cession, the Federal Government unreservedly obligated and took it upon itself, not as a matter of favor, gift or gratuity, but in *pay-*

*ment* of a debt incurred and contracted for valuable property and property rights obtained by it in a transaction of bargain and sale between it and the Indians, to furnish the Indians the financial aid and other assistance demanded by them to carry on industrial pursuits, and in that way "become self-supporting, as a pastoral and agricultural people." The United States "*agreed*", to expend annually for a period of ten years, large sums of money, for the purpose of furnishing said Indians with:

> "Cows, bulls, and other stock * * * *agricultural and* mechanical implements, * * * school buildings, mills, and blacksmith, carpenter and wagon shops as may be necessary, *in assisting the Indians* to build homes and inclose their farms, and in other respects to promote their civilization, comfort and improvement."

Article III, 25 St. at L. 114.

And:

> "*In order to encourage habits of industry, and reward labor,*"

it was further provided, understood and solemnly agreed between the contracting parties,

> "that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence and *agricultural implements*, as provided for in Article III, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially

to those who in good faith *undertake the cultivation of the soil,* or engage in pastoral pursuits, as a means of obtaining a livelihood."

Article V, 25 St. at L. on pp. 114-115.

Now it would seem, in view of the plain language employed, that there could be no room for doubt, or any difficulty in determining, as to just what was meant and intended by the parties to the treaty. But it was contended by the learned counsel for defendants in the court below, that no intention is evinced or manifested by these agreements and stipulations that either the Indians or the Government contemplated the use of the waters of Milk River as an agency with which to effectuate the objects and purposes mentioned in the treaty. And now it is here asserted that "the right to irrigate lands was not a right possessed", nor ever exercised, or "*then claimed*" by the Indians, and to say that when the Indians declared their intention to carry on "agricultural pursuits", and become "an agricultural people", they intended and expected to carry on those pursuits by means of irrigating their lands, it would be forcing a construction of the terms of the treaty in such a way as to imply and signify "the practice of agriculture not as pursued by the Indians, but as developed by the scientists of modern times." It may here be suggested, in passing, that counsel seem to forget that, in the language or Mr. Kinney, (Kinney on Irrigation, Sections 10-17),

"irrigation is a very ancient art and was pract-

iced by the *earliest nations of the earth* upon a *most magnificent scale*",

and that:

> "probably the greatest souvenir left by the *aboriginal races of North America* is to be found in the *maze of prehistoric canals* found in the Salt River and Gilla Valleys of Arizona,"

water and irrigation systems constructed at a time, it is safe to assume, when the hoary forefathers of counsels' "scientists of modern times", garbed in skins, were still groping along, mentally and intellectually, in cimmerian darkness.

Be that though as it may, in the language of Mr. Justice McKenna, in the Winans case, correctly quoted in appellants' brief:

> "How the treaty in question was understood by the Indians may be gathered from the circumstances."

And in the interpretation of the language used, it is to be construed:

> "Not according to the technical meaning of its words to learned lawyers, but in *the sense in which they would naturally be understood by the Indians.*"

As stated by the Supreme Court of the United States in Jones vs. Meehan, 175 U. S. on p. 11:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was

pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, *are a weak and dependent people*, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but *in the sense in which they would naturally* be understood by the Indians."

What then were the circumstances surrounding the making of the treaty, and what was the meaning or significance of the language used as the same must have "naturally" been understood by the Indians? It was a well known, fully recognized and established fact that not a foot of the ground embraced within the Indian reserve could be cultivated or made productive, either as a grazing or farming country, without water for irrigation. Without water it would remain for all time to come, a dry, arid, and barren waste. Indeed, in the

language of appellants' counsel, "the land would be worthless without water". From time immemorial these Indians and their fathers had enjoyed and exercised "the uninterrupted privilege of fishing" in the waters of this stream from its source to its mouth. They had that right then and they have it now throughout the length of the stream which still remains a part of the reservation.

Can there be any question as to how these Indians must "naturally" have understood the treaty of 1888? Why, at that time, not a drop of the waters of the stream was or had ever been taken from its channel by a white man for any purpose. The entire stream was then and always had been a part of the Indian country, and a part of the Indian reservation theretofore occupied by them. They and their fathers, from time immemorial, had seen the waters of the stream flow down past and through their reservation in abundance, and at no time had they known or seen the channel of Milk River other than as a flowing, living stream. When the extent and area of the new reservation was determined and defined by treaty and agreement, one half of the stream was specially, particularly, and carefully reserved as a part and portion of the reservation, and while at that time the Indians may not have made use of much, if any, of the waters for irrigating purposes, they knew that the very object and purpose which actuated them in consenting to a diminution of their territorial domain, to-wit:

"To obtain the means to enable them to become *self-supporting as a pastoral and agricultural people,*"

required the use of these waters to enable them to accomplish those very objects and purposes. With all of these things before them, it would be preposterous to assume that they understood their bargain with the Government in any other way than that there was secured and reserved to them the flowing, living stream as they had always known and seen it.

Indeed, why was it,—if it was not for the purpose of assuring, satisfying, and convincing the Indians by the most conclusive and persuasive evidence of which they, with their limited knowledge and experience, and in their narrow intellectual capacity, could have any conception, that they had in fact and in law secured and reserved, and that they would at all times have for their undisturbed use and enjoyment, the necessary waters to carry on the industrial pursuits and exercises all other rights secured to them by the treaty—that the initial point of the boundary line of the Ft. Belknap Reservation was placed:

"*In the middle of the* main channel of Milk River opposite the mouth of Snake Creek",

and then after defining the western, southern, and eastern boundaries, again returned and extended:

"to a point in the *middle* of the main channel

of Milk River opposite the mouth of Peoples Creek, and thence up Milk River, in *the middle of the main channel thereof*, to the place of beginning."

25 St. at L. p. 124.

Why this precise, careful and emphatic language in defining the center of the river as the northern boundary line, thus making and constituting the one half of the main channel of Milk River with its waters a part and portion of the reservation, if it was not the intention, as well as the understanding, of the parties to this treaty, that the waters, absolutely demanded for the consummation of the purposes and objects for which the reservation was established, should enure to the benefit of the Indians as much so as any other part or portion of the premises confined within the boundaries laid down.

Nor did the Government interpret or understand the treaty in any other way. In fact counsel themselves say that "the irrigation and cultivation of Indian lands" is the policy of the Government. It never did claim, nor does it now assert, that there was a surrender by the Indians of their rights to the waters of the stream. It knew that the agricultural, pastoral and other pursuits mentioned in the treaty could not possibly be carried on without the use of these waters. It did not ask for, and it did not get a surrender of the fishing rights and privileges, or any other right held by the Indians in and to the waters of the stream, on the contrary, the stream itself was incorporated in and made a part of the reserva-

tion. It knew that the waters of the river were, in the language of the Supreme Court in the Winans case, "not much less necessary to the existence of the Indians than the atmosphere they breathed", and in order to fulfill the treaty obligations to which it had become solemnly bound, it then and thereafter appropriated and expended large sums of money to enable and to assist said Indians to

"*enclose and irrigate their farms.*"

Article II, Treaty of October 9, 1895; 29 St. at L. 351.

And the fact is that the larger portion of the funds provided for the advancement and improvement of the Indians by the terms of these various treaties and agreements, was used and expended in the construction of dams, canals and water ways with and through which to utilize the waters of Milk River for irrigation and other useful and beneficial purposes upon the reserve.

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IV.

We have now come to a consideration of the case of

KRALL VS. UNITED STATES,

which arose in the District of Idaho, was decided by this Court in 1897, and upon which the counsel for appellants seem to rely with a considerable display of confidence. They say, in effect, that the questions involved here were

determined adversely to the Government there, and that the principle enunciated in the Krall case, is determinative in favor of appellants in the case at bar. That counsels' assumtion, as to the operative effect of the decision of this Court in the Krall case, is based upon false and erroneous premises, becomes clearly apparent upon a reading of the Court's opinion and an examination of the facts and circumstances upon which it is predicated.

Idaho was organized as a Territory, and a territorial government was established, on March 3, 1863. (12 St. at L. p. 808 et seq.). All lands embraced within the boundaries as defined, except Indian reservations, became a part of the Territory and were included within its territorial limits and "*jurisdiction*". (Sect. 1, p. 809). Its legislative power extended "to all rightful subjects of legislation consistent with the Constitution of the United States", (Sect. 6, p. 810), and "the constitution *and all laws of the United States*, not locally inapplicable", had "the same force and effect within said Territory as elsewhere within the United States". (Sect. 13, p. 813). The Act of Congress maintaining and protecting the owners of vested rights to the use of waters on the public lands acquired by appropriation, provided the same were "recognized and acknowledged by the local customs, laws, and the decisions of the courts," was passed in July 1866, (Sect. 2339 Rev. St.; 14 St, at L. p. 253), and during all of this time and thereafter "Cottonwood Creek", was a stream flowing upon and was embraced within the

*public domain*, to which class of lands the Act of July 1866 was applicable. The waters of Cottonwood Creek were therefore free and open to appropriation, provided the local customs, laws and the decisions of the courts recognized and acknowledged the acquisition of rights to the use of water by that means. It is and always was so recognized and acknowledged in Idaho, not only *as a means* to acquire a water right, but as the *only* and *exclusive* means of acquisition. The doctrine of riparian rights does not exist there. The courts of Idaho call it a "*phantom*", and it was then, is now, and always has been considered a stranger in the land. Appropriation, governed by the "maxim first in time, first in right" is the "*settled law*" there.

Drake vs. Earhart, 23 Pac. on p. 542.

In 1868 the War Department appropriated, for governmental purposes, 640 acres of land upon the banks of Cottonwood Creek, and procuring the same to be reserved "by presidential proclamation", established thereon a military post. But, in the language of the majority opinion of the Court, "the creation of the reservation for military post purposes did not destroy or in any way affect the doctrine of appropriation thus established by the government in respect to the waters of nonnavigable streams upon the public lands", nor, upon the same line of reasoning, would it have destroyed or affected riparian rights if they had existed and been recognized in that District. The Government became a

riparian proprietor, but in a country where the fact of riparian proprietorship conferred no privileges, and where riparian rights were not recognized or known. It located its establishment upon the banks of a stream, the waters of which had been, at all times prior thereto, subject to the operation of territorial customs and laws governing the right to the use of the waters, and the doctrine of riparian proprietorship, and the rights incident thereto, having been abolished, the acquisition of a right to the use of such waters in any way or manner other than as so defined and prescribed by such laws was barred and precluded. And if, as was held in the majority opinion of the Court, the government has, "in respect to the waters of nonnavigable streams upon *the public lands*" no "superior right to any which citizens can acquire", then, indeed, the government could acquire no greater right to the use of the waters of the stream than any citizen and resident of Idaho could have acquired by merely obtaining title to, and taking possession of, the land.

Such was the situation and such were the facts and circumstances in the Krall case, and clearly they are in every way and in every feature different from and dissimilar to those in the case at bar. In the Idaho case the lands were and, since the organization of the Territory, always had been a part of the public domain, here the lands in question never were or became public lands. There the waters of the stream were and always had

been subject to appropriation, under state and federal laws, here neither state nor federal laws providing for the appropriation of water ever were or became operative upon them. There the government came in substantially like any other person taking possession for private and proprietary uses of a portion of the public domain. Here the lands and waters, and the rights incident and appertaining thereto, had never been held in any other capacity than that of reserved or proprietary ownership. There the particular uses and purposes for which the reservation was established did not imply or even give rise to the inference that for its existence and maintenance the use of the waters of the stream would be required, but here it was known and understood that the waters and the use thereof were a *sine qua non* as much so as the land itself. There the rights incident to riparian proprietorship were entirely wanting, here they are fully recognized and enforced. There the Government did not acquire proprietary riparian ownership until it selected from the public domain, thus subject to the limitations which the policy of the territorial government imposed, the tract in question for governmental uses, here the government and the Indians, from time immemorial, have been proprietary riparian owners, free from and independent of any state or federal legislation concerning public lands and waters. And when the formerly more extensive territorial domicil of these Indians was reduced, they expressly reserved the waters

and the use of the waters of Milk River for their use and enjoyment at and upon their place of abode. This reservation, therefore, and everything appertaining thereto and connected therewith, was *not one* established, in the language of the majority opinion in the Krall case,

> "subsequent to the time when the government, by its conduct in recognizing and encouraging the local custom of appropriating the waters of the non-navigable streams upon the public lands for agricultural and other useful purposes, had become bound to recognize and protect a right so acquired," and, "subsequent, also, to the passage of the act of Congress of July 26, 1866, making statutory recognition of that right, and confirming the holder in its continued use,"

but on the contrary, its existence reaches way beyond.

Now, aside from the question of the reservation and the retention by the Indians of the waters and the right to the use of the waters of Milk River, as heretofore discussed; and aside from the consideration of other features in this case so greatly at variance with those of the Krall case, we take it that no one would pretend to say that the principle of that case is applicable in a locality where the doctrine of riparian rights is recognized as fully as it is in Montana. As conceded by the counsel for the appellants, in such case "the rights of riparian owners are to be determined by the state laws

and decisions," and such decisions are "conclusive on this Court."

Appellants' Brief, p. 30.

As stated in Kinney on Irrigation, commenting on the decision of the Supreme Court of the United States in Sturr vs. Beck, 133 U. S. 541, involving the rights of an appropriator of water as against the rights of a riparian owner, in a locality where both rights were recognized and enforced:

> "It settles the law that there are in certain jurisdictions which recognize and protect the common law theories of riparian rights in the arid region *two distinct water systems*—one based upon a possessory right by the mere appropriator of the water to some beneficial use or purpose, and the other based upon the ownership of the land through or adjoining which the stream flows. This also settles the case that except in those States and Territories which have enacted statutory provisions *abolishing what is known as the common law riparian rights*—those riparian rights will be protected by the highest judicial tribunal in the country, as against all subsequent appropriators of water naturally flowing over or adjoining the lands."

Kinney on Irrigation, Sec. 220.

And that they are recognized, protected, and enforced by the highest tribunals in the State of Montana is conclusively settled, as we have shown, in:

Thorp vs. Freed, 1 Mont., 651.

Smith vs. Denniff, 24 Mont. 20.

Cruse vs. McCauley, 96 Fed. 369.

———o———

Not only were the waters and the use of the waters of Milk River reserved to the Indians by the terms of the treaty of 1888, but they were actually appropriated. Upon this point counsel urge that while the affidavits filed on behalf of the several defendants tend to show that each of them has complied with the several requirements of the state law to make a valid appropriation of the waters of Milk River, there is no claim that the United States or any one in its behalf has complied with the law. In reply it would suffice to say, as repeatedly held by this Court, that the property and the property rights of the United States and its wards are not affected by state enactments.

McKnight vs. U. S., 130 Fed. 659.

Pond et al., vs. U. S., 111 Fed. 989.

The Supreme Court of Montana, in speaking of statutory requirements governing the acquisition of water rights by appropriation by private individuals, said:

"When the government had the reservation, it owned both the land included therein, and all the

water running in the near-by streams to which it had not yielded title. It was therefore unnecessary for the government to "*appropriate*" the water. It owned it already. All it had to do was to take it and use it."

Story vs. Wolverton, 78 Pac. p. 590.

So likewise in Nevada Ditch Co., vs. Bennett, 45 Pac. on page 484, the Supreme Court of Oregon said:

"In the Pacific Coast states, Congress has recognized the privilege of private citizens to acquire usufructuary interests in the waters of public streams independent of riparian ownership. This is but one way, however, of disposing of the public domain. A new and peculiar right is carved out of it and settled upon private persons, either in their individual or corporate capacity. Now if such an estate may be carved out of the public domain for an individual, it may be reserved by the general government; but the waters of nonnavigable streams are part of such public domain, and hence the property of the government, which may lay hold of and use them, *without taking any of the steps made necessary to obtain a usufructuary interest therein by private individuals.* But if it would prevent individuals from acquiring interests by prior appropriation, it would seem that there should be a reservation made of such waters, either by act of Congress, or some executive order."

Such a reservation was made in this case. As has been seen, the purpose which induced the Indians to dis-

pose of those portions of their former holdings which they did not need for their "present or prospective wants", was to obtain the means to enable them to become "self-supporting, as a pastoral and *agricultural people*," and in order to enable them to accomplish this policy, the government, on its part, agreed to furnish them the means, to supply "cows, bulls, and other stock * * * agricultural and mechanical implements," and "in order to encourage habits of industry and reward labor", it was expressly agreed between the contracting parties, that in the distribution thereof, preference should be given "to those who in good faith undertake the cultivation of the soil, as a means of obtaining a livelihood." But to do this—that is to cultivate the soil "as a means of obtaining a livelihood,"—the waters of the stream were as imperatively needed and required as the soil itself, as was fully known not only to the government but to the Indians as well. Both soil and water were there, and in order to satisfy the Indians in, to them, the most convincing manner that they were to have and retain both soil and water, the boundary line of the reservation was placed in the center of the stream. This was, in the language of the Supreme Court in Sturr vs. Beck, 133 U. S. 541, an "appropriation of both land and water" which, according to the decision in that case, carried with it the right to the use of the water.

Not only was this in fact and in law an appropriation of both land and water, but in the language of Judge

Field in Carpenter vs. U. S., 111 U. S. 347, it was "*notice*" to the world that the waters in question, and the whole thereof, if necessary, would be used for the purposes enumerated in the treaty.

Thus in Schwab vs. Beam, 86 Fed. on pp. 42-43, a case decided by Judge Hallet in the U. S. Circuit Court of the District of Colorado, a state where the doctrine of appropriation is recognized and enforced to its fullest extent, and the Judge delivering the opinion, himself, as he states:

> "An early advocate of the right to appropriate water for irrigating lands, as always understood and maintained" in that state, and desiring "to recognize and enforce the principle on which it stands in every case to which it may be applicable,"

in discussing the rights incident to a placer location upon the banks of a stream to use the waters of the stream in the working of the claim, said:

> "A placer location *ex vi termini* imports *an appropriation of all waters covered by it*, in so far as such waters are necessary for working the claim. This is true especially when the location covers both banks of the stream, because there is a *reasonable presumption* that the locator intends to work the channel and the banks, wherever he may find pay dirt. A placer claim cannot be worked without water."

See also:

> Crandall vs. Woods, 8 Cal. 136.

So in this case, the reservation cannot possibly be farmed or cultivated without water, but that it was designed and intended to be farmed and cultivated, does not rest here, as in the Schwab case, *supra*, simply on a "reasonable presumption", but such is the expressly declared and defined object of its establishment and existence.

———o———

V.

A great deal is contained in the brief of counsel for the appellants concerning grants of this and grants of that, assumed by them to have been made by the general government, and much is sought to be made out of the fact that by the third section of the Act of Congress ratifying the agreement, (25 St. at P. p. 133), the lands not embraced within the boundary lines as fixed in the instrument defining the limits of the reservation, were made a part of the public domain and open to the operation of certain laws governing in the acquisition of title to public lands. Of course, it should be noted that the very section of the statute relied on is applicable only to such "lands to which the *right* of the Indians is extinguished under the foregoing agreement," and it is well settled that "where rights claimed under the United States are set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them."

Leavenworth R. R. Co. vs. U. S., 92 U. S. 733.

It is not claimed or asserted by the learned counsel that by the provisions themselves of this Act any rights were conferred upon prospective settlers to the use of the waters of Milk River, but they contend that as the lands ceded by the Indians were expressly made subject to entry under the homestead and desert land laws, and as they would be "worthless without water", that of necessity the waters of the stream became likewise subject to appropriation for use upon the lands, because upon any other hypothesis, counsel say, "the Act of Congress throwing open to settlement the land purchased from the Indians became a nullity, for the reason that the lands were not capable of being settled under the laws applicable to them without the use of the water". Just upon what basis or theory of reasoning a presumption of that kind should be invoked and applied in behalf of defendants, and denied as regards the Indians, whose lands, reserved to them for "agricultural pursuits", are, as to productiveness without water, in precisely the same situation as are the lands of the defendants and that ceded by the Indians, it is hard to conceive. Besides, the mere fact that the land had been opened to entry imposed no obligation on any of the defendants to make entry, but which, if made, was made with notice of and subject to existing rights.

It is undoubtedly true, as counsel say, that the Act of March 3, 1877, as amended in 1891, commonly known as the "Desert Land Act", and under the provisions of

which some of the defendants are said to have acquired their lands, recognizes the doctrine of appropriation under state laws, but whatever rights or privileges the Act in question grants or confers, they are and shall be, in the very language of the Act:

"subject to existing rights."

1 Supp. Revised Statutes, p. 137.

And the rights of the Indians to the use of the waters were "existing rights", reserved and secured to them by the provisions of the treaty. As was said by the Supreme Court of the United States in R. R. Co. vs. Roberts, 152 U. S. on pp. 117-118:

> "It has always been held that the occupancy of lands set apart by statute or treaty with them for their use, *cannot be disturbed* by claimants *under other grants of the government.*"
>
> Cruse vs. McCauley, 96 Fed. on p. 374.

Besides:

> "All grants of this description are strictly construed against the grantee. Nothing passes but what is conveyed *in clear and explicit language.*"
>
> Story vs. Wolverton, (Mont.), 78 Pac. 589 and cases cited.

Moreover, that these very laws do not authorize or justify, in the light of the facts and circumstances of this case, any interferences with the rights of the government

and the Indians to the use of the waters of Milk River, was clearly settled in the Rio Grand case, where the Court, speaking of the limitations upon the right of appropriation under state laws, said:

> "That in the absence of special authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary *for the beneficial uses of the government property.*"
>
> U. S. vs. Rio Grand D. & I. Co., 174 U. S. on p. 703.

And that no such "special authority" has not as yet been conferred by any of the acts of Congress relating to the appropriation of waters so as to justify by virtue thereof, interference by appropriators with the use of waters "necessary for the beneficial uses of the government property", becomes clear from the decision in the Rio Grand case, *supra*, because each and every one of the federal statutes, relating to the appropriation of waters, was fully considered by the Court, to-wit: The Act of 1866, being now Sect. 2339 Rev. St.; the Act of 1877, the Desert Land Act, and the Act of 1891, providing for the right of way over and across government reservations for canals and water ways.

To the same effect:

> Gutierres vs. Albuquerque L. & I. Co., 188 U. S. 545.

Mindful of the important questions at issue in this case, involving the very existence of the Indians, and their right to hold and enjoy the little they have managed to preserve and retain of their former once extensive possessions, we have discussed somewhat fully and at length the several propositions which we deem controlling and decisive of this controversy. And in submitting the case we say that, in the light of the facts and the law applicable thereto, there cannot be the shadow of a doubt but that the order of the trial Court in granting the temporary injunction was properly and rightfully made, and the same should be affirmed.

Respectfully submitted,

CARL RASCH,

United States Attorney.

No. 1243

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HENRY WINTERS et al.,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA,
*Appellee.*



## REPLY BRIEF FOR APPELLANTS.

E. C. DAY,
JAMES A. WALSH,
*Solicitors and of Counsel for Appellants.*

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## Reply Brief of Appellants.

In view of the fact that counsel for appellee has assumed in his brief, and emphasized in his oral argument the proposition that the common-law doctrine of riparian rights is still in force in Montana, we would respectfully ask leave of Court to submit a supplementary statement of the statutory enactments and decisions of the State and Territory with reference to the right to the use of water in Montana.

We have never, at any stage of these proceedings, conceded, for the purpose of argument or otherwise, that this doctrine has any application in Montana, but now reassert that the legislature of the Territory and State of Montana abrogated and abolished the common-law doctrine and made the right to the use of water depend entirely upon statutory appropriation. No case has been presented to the Supreme Court of Montana where the rights of either

of the parties were dependent upon riparian ownership of land, and the expressions of the Court, cited by counsel, in his brief, were used argumentatively or are *obiter dicta*. The distinction sought to be made by counsel between the laws of Montana and those of Idaho, Wyoming and Colorado does not in fact exist.

I.

That there may not be any question in the mind of the Court as to the statutory laws of the State and Territory, we beg leave to call your attention to the following, as a complete reprint of the statutes which have been enacted upon that subject.

The first law, approved January 12, 1865, was as follows:

An Act to Protect and Regulate the Irrigation of Land in Montana Territory.

Sec. 1. That all persons who claim, own or hold a possessory right or title to any land, or parcel of land, within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek, or river for the purpose of irrigation, and making said claim available to the full extent of the soil for agricultural purposes.

Sec. 2. That when any person owning claims in such locality has not sufficient length of area exposed to said stream in order to obtain a sufficient fall of water neces-

sary to irrigate his land, or that his farm or land used by him for agricultural purposes is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for the purposes as hereinbefore stated.

Sec. 3. That such right of way shall extend only to a ditch, dyke or cutting sufficient for the purposes required.

Sec. 4. That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion a certain amount of said water, upon certain alternate weekly days, to different localities, as they may in their judgment think best for the interest of all parties concerned, and with a due regard to the legal rights of all.

Sec. 5. That upon the refusal of owners of tracts of land or lands through which said ditch is proposed to run to allow of its passage through their property, it shall be proper for any justice of the peace, upon application being made, and proper notice being given to parties, as in other cases of litigation under the jurisdiction of a justice of the peace, to appoint three com-

missioners or reviewers, composed of disinterested claim holders within the townships, who shall proceed to view the premises, taking into consideration the necessities and rights of both parties, also the size of the cutting.

Sec. 6. That if the commissioners thus appointed shall think proper, they shall proceed to assess any damage which said ditch may cause to the owner of the lands through which it passes, taking also into consideration any advantages which he may derive from said ditch.

Sec. 7. That said assessment, upon its proper returns, sworn to and properly certified, the justice of the peace shall proceed to render his judgment, based upon the assessment of the commissioners, as he would do in any action of debt which may come under his jurisdiction, and subject to the like mode of execution and enforcement. In case the damage shall exceed the jurisdiction of the justice of the peace, the commissioners shall report to the probate judge of the county, who shall proceed in the same manner as required of the justice of the peace.

Sec. 8. That all persons on the margin, brink, neighborhood, or precinct of any stream of water, shall have the right and power to place upon the bank of said stream a wheel, or other machine, for the purpose of raising water to the level required for purposes of irrigation, and that the right of way shall not be refused by the owners of any tract of land upon which it is re-

quired, subject to the like regulation as required for ditches, and laid down in the preceding sections.

Sec. 9. That the said commissioners, as provided for in section five, shall be allowed two dollars each per day for their services.

Sec. 10. That the provisions of the sections of this act shall not conflict with any rights of mills or millmen, or interfere with any milldam, race, or watercourse which already exists.

Sec. 11. That the provisions of this act shall also entail upon the parties using water as provided above, the careful management and control of said water, that in their waste they shall not injure anyone, and if so injured, damages shall be assessed as hereinbefore provided.

Sec. 12. That this act to take effect from and after its passage.

Approved January 12, 1865.

Laws of Montana, 1864-1865, pp. 367-369.

This law remained in force until January 12, 1872, when a revision of the laws was made, and what is hereinafter quoted as section 1239 to section 1249, inclusive, was adopted, excepting the proviso contained in section 1239, which was adopted in 1879. See codified statutes 1871-72, pp. 498-500.

On February 16, 1877, sections 1263-1266, inclusive, hereinafter quoted were adopted. See Session Laws of 1877, pp. 406, 407.

On February 21, 1879, the proviso contained in section 1239 was added, and sections 1239 to 1249, inclusive, hereinafter quoted were adopted in the Revised Statutes. See Revised Statutes 1881, page 562. Sections 1263 to 1266, inclusive, seem to have been omitted in the Revision of 1881.

In 1887 the Statutes of Montana were again revised and the law therein relating to the appropriation of water is as follows:

Sec. 1239. Any person or persons, corporation or company, who may have or hold a title, or possessory right or title, to any agricultural lands within the limits of this Territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said Territory for the purposes of irrigation and making said land available for agricultural purposes to the full extent of the soil thereof: Provided, That in all cases where, by virtue of prior appropriation any person may have diverted all the water of any stream, or to such an extent that there shall not be an amount sufficient left therein for those having a subsequent right to the waters of such stream for such purpose of irrigation, and there shall at any time be a surplus of such water so diverted, over and above what is actually used for such purpose by such prior appropriator, such person shall be required to turn and cause to flow back into such stream such surplus water, and upon failure so to do, within five days after demand being made upon him

in writing by any person having a right to the use of such surplus water, such person, so diverting the same, shall be liable to the person aggrieved thereby in the sum of twenty-five dollars for each and every day, such water shall be withheld after such notice; to be recovered by civil action by any person having a right to the use of such surplus water.

Note.—Act February 21, 1879.

Sec. 1240. When any person or persons, corporation or company, owning or holding land as provided in section 1239 of this chapter, shall have no available water facilities upon the same, or whenever it may be necessary to raise the waters of said stream or creek to a sufficient height to so irrigate said land, or whenever such lands are too far removed from said stream to use the waters thereof as aforesaid, such person or persons, corporation or company, shall have the right of way through and over any tract or piece of land for the purposes of conducting and conveying said water by means of ditches, dikes, flumes, or canals, for the purpose aforesaid.

Sec. 1241. Such right to so dig and construct ditches, dikes, flumes and canals over and across the lands of another, shall only extend to so much digging, cutting or excavations as may be necessary for the purposes required.

Sec. 1242. In all controversies respecting the rights to water, under the provisions of this chapter, the same shall be determined by the date of the appropriation, as respectivly made by the parties.

Sec. 1243. The waters of the streams or creeks of the territory may be made available to the full extent of the capacity thereof for irrigating purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of the prior appropriator; but in no case shall the same be diverted or turned from the ditches or canals of such appropriator, so as to render the same unavailable.

Sec. 1244. Any person or persons, corporation or company, damaging or injuring the lands or possessions of another, by reason of cutting or digging ditches or canals, or erecting flumes, as provided by section 1240 of this chapter, the party so committing such injury or damage shall be liable to the party so injured therefor.

Sec. 1245. This chapter shall not be so construed as to impair or in any way or manner interfere with the rights of parties to the use of the water of such streams or creeks acquired before its passage.

Sec. 1246. This article shall not be so construed as to prevent or exclude the appropriators of the waters of the said streams or creeks for mining, manufacturing, or other beneficial purposes, and the right also to appropriate the same is hereby equally recognized and declared.

Sec. 1247. Any person or persons, corporation or company, who may dig and construct ditches, dikes, flumes or canals, over or across any public roads or highways, or who use the waters of such ditches, dikes, flumes or canals, shall be required to keep the same in good repair at such crossings or other places where the water from

any such ditches, dikes, flumes or canals may flow over, or in anywise injure any roads or highways, either by bridging or otherwise.

Sec. 1248. Any person or persons, offending against section 1247 of this chapter, on conviction thereof, shall forfeit and pay for every such offense a penalty of not less than twenty-five dollars, nor more than one hundred dollars to be recovered, with costs of suit, in civil action, in the name of the Territory of Montana, before any Court having jurisdiction; one-half of the fine so collected shall be paid into the county treasury for the benefit of the common schools of the county in which the offense was committed, and the other half shall be paid to the person or persons informing the nearest magistrate that such offense has been committed. All such fines and costs shall be collected without stay of execution, and such defendant or defendants may, by order of the Court, be confined in the county jail until such fine and costs shall have been paid.

Sec. 1249. In all controversies respecting the right to water in this territory, whether for mining, manufacturing, agricultural, or other useful purposes, the rights of the parties shall be determined by the dates of appropriation respectively, with the modifications heretofore existing under the local laws, rules, or customs and decisions of the Supreme Court of the territory.

Note.—Act of January 12, 1872. Comp. Stats. 1887, p. 993.

Sections 1250 to 1257, inclusive, of the Compiled Stat-

utes are found on pages 23 and 24 of our former brief, and are not here reprinted.

Sec. 1258. Persons who have heretofore acquired rights to the use of water shall, within six months after the publication of this act, file in the office of the recorder of the County in which the water right is situated a declaration in writing, except notice be already given of record as required by this act, the same facts as required in the notice provided for record in section 1255 of this chapter, such declaration shall be verified as required in section 1255 of this chapter, in cases of notice of appropriation of water: Provided, That a failure to comply with the requirements of this section may in nowise work a forfeiture of such heretofore acquired rights nor prevent any such claimant from establishing such rights in the courts.

Sec. 1259. The record provided for in sections 1255 and 1258 of this chapter, when duly made, shall be taken and received in all the courts of this territory as *prima facie* evidence of the statements therein contained.

Sec. 1260. In any suit hereafter commenced for the protection of rights acquired to water under the laws of this territory, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such actions, and the court may in one decree settle the relative priorities and rights of all the parties to such suit. When damages are claimed for the wrongful diversion of water in any such suit, the same may be assessed and apportioned by the jury in their verdicts, and

judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves.

In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same is asked by the parties to the action, the courts shall hear and determine such controversy as if the same were several as well as joint.

Sec. 1261. The recorder of such county must keep a well-bound book, in which he must record the notices and declarations provided for in this act, and he shall be entitled to have and receive the same fees as are now or hereafter may be allowed by law for recording instruments entitled to be recorded.

Sec. 1262. The measurement of water appropriated under this chapter shall be conducted in the following manner: A box or flume shall be constructed with a headgate placed so as to leave an opening between the bottom of the box or flume and the lower edge of the headgate, with a slide to enter at one side of and of sufficient width to close the opening left by the headgate, by means of which the dimensions of the opening are to be adjusted. The box or flume shall be placed level and so arranged that the stream in passing through the aperture is not obstructed by back water or an eddy below the gate; but before entering the opening to be measured the stream shall be brought to an eddy, and shall stand three inches on the headgate and above the top of the opening. The num-

ber of square inches contained in the opening shall be the measure of inches of water.

Note.—Sections 1250-1262, Act of March 12, 1885.

Section 1263. That any person or persons, company or corporation, having the right to use, sell or dispose of water, and engaged in using, selling or disposing of the same, who shall have a surplus of water not used, or sold, or any person or persons, corporation or company, having a surplus of water, and the right to sell and dispose of the same, shall, and they or it are hereby required, upon the payment or tender to the person or persons entitled thereto, an amount equal to the usual and customary rates per inch, to convey and deliver to the person or persons, company or corporation, such surplus of unsold water, or so much thereof for which said payment or tender shall have been made, and shall continue so to convey and deliver the same weekly so long as said surplus of unused or unsold water shall exist and said payment or tender made as aforesaid.

Section 1264. Any person or persons, corporation or company, desiring to avail themselves of the provisions of this chapter, shall, at their own cost and expense, construct or dig the necessary flumes or ditches, to receive and convey the surplus water so desired by it or them, and shall pay or tender to the person or persons, corporation or company having the right to the use, sale or disposal thereof, an amount equal to the necessary costs and expense of tapping any gulch, stream, reservoir, ditch, flume or aqueduct, and putting in gates, gauges or other

proper and necessary appliances usual and customary in such cases and until the same shall be so done the delivery of the said surplus water shall not be required as provided by section 1263 of this chapter.

Section 1265. That any person or persons, corporation or company, constructing the necessary ditches, aqueducts or flumes and making the payments or tenders hereinbefore provided shall be entitled to the use of so much of the said surplus water as said ditches, flumes or aqueducts shall have the capacity to carry, and for which payment or tender shall have been made as aforesaid, with all the rights and privileges incidental thereto so long as said unsold or surplus water exists and said payment or tender shall be or have been made, and may institute and maintain any appropriate action at law or in equity for the enforcement of such right or recovery of damages arising from a failure to deliver or wrongful diversion of the same.

Section 1266. That nothing in this chapter shall be so construed as to give the person or persons, corporation or company, acquiring the right to the use of water as hereinbefore provided, the right to sell or dispose of the same after being so used by it or them, or prevent the original owner or proprietor from retaking, selling and disposing of the same in the usual and customary manner, after it is so used as aforesaid.

(Note.—Act of Feb. 16, 1877.)

In 1895 the laws of Montana were codified, taking effect July 1st, 1895. Sections 1250 to 1257, inclusive, quoted on pages 23 and 24 of our former brief, were adopted as

sections 1880, 1881, 1882, 1883, 1885, 1886, 1887 and 1888, respectively, of the Civil Code.

Sections 1258 to 1263, inclusive, heretofore quoted in this brief were adopted as sections 1889, 1890, 1891, 1892 and 1893, respectively, of the Civil Code.

The proviso contained in section 1239, *supra*, was adopted as section 1884 of the Civil Code.

These sections being heretofore quoted are not here reprinted.

In 1899, Session Laws, page 126, section 1893, was repealed, and the cubic foot per second made the standard of measurement.

Section 1880 was amended in 1901 to read as follows:

"The right to the use of any unappropriated water of any natural stream, watercourse, spring, dry coulie, or other natural source of supply and of any running water flowing in streams, rivers, canyons, and ravines of this State may hereafter be acquired by appropriation."

Session Laws, 1901, page 152.

Section 1894. The right to conduct water from or over the land of another for any beneficial use, includes the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for pub-

lic use; provided further, that if it is necessary to conduct the water across the right of way of any railroad, it shall be the duty of the owners of the ditch or flume to give thirty days' notice in writing to the owner or owners of such railway of their intentions to construct a ditch or flume across the right of way of such railroad and the point at which the said ditch or flume will cross the railroad, also the time when the construction of said ditch or flume will be made. If the owner or owners of such railroad or their agent fails to appear and attend at the time and place fixed in said notice, it shall be lawful for the owner or owners of said flume or ditch to construct the same across the right of way of such railroad, without further notice to said owner or owners of the railroad.

(Section 1894 Act approved March 18, 1895.)

Section 1895. Any person who digs and constructs ditches, dikes, flumes or canals, over or across any public roads or highway, or who uses the water of such ditches, dikes, flumes or canals, is required to keep the same in good repair at such crossings or other places where the water from any such ditches, dikes, flumes or canals may flow over or in anywise injure any road or highway, either by bridging or otherwise.

Section 1896. Any person offending against the preceding section, on conviction thereof shall pay for every offense a fine of not less than twenty-five dollars, nor more than one hundred dollars, with costs of prosecution. One half of the fine shall be paid into the County

Treasury for the benefit of the common schools of the county in which the offense was committed and the other half shall be paid to the person informing the nearest magistrate that such offense has been committed, who shall issue a warrant upon proper complaint being made.

Sections 1897, 1898, 1899 and 1900 of the Civil Code are heretofore quoted from the Compiled Statutes of 1887 as sections 1263, 1264, 1265 and 1266, respectively, and are not here reprinted.

Sections 1901 and 1902 provide how dams and reservoirs shall be constructed.

In 1891 (Session Laws, p. 295), the legislature passed an act regulating the procedure in court to obtain the right of way to construct ditches on the lands of another. This is now embodied in the codes in the chapter relating to eminent domain.

In 1899 (Session Laws, p. 136) a law was passed, giving the courts authority to appoint commissioners to divide water between appropriators. Such commissioners are given authority to enter upon premises and to make arrests.

From the foregoing it will be seen that the first legislative assembly of the Territory enacted, and there has been in force ever since, a complete system of laws defining and regulating the manner in which water may be appropriated, and the rights of the respective appropriators determined, protected and enforced. Judge Knowles said in Thorpe vs. Freed, *infra,* that the law as first enacted

established the right to water by appropriation and abolished riparian rights. To remove whatever doubt may have existed hitherto, the legislature in 1872 amended section 1 of the law by striking out all of that portion of the section providing for the irrigation of land "on the margin, bank or in the neighborhood of any stream," and gave the right to appropriate to the fullest extent of the stream without regard to deterioration of quality or diminution of quantity, so long as the rights of prior appropriators were not affected. Riparian ownership was not recognized, but all rights were to be determined by the date of appropriation. First in time was first in right.

The right of appropriation, as given by these laws, is wholly inconsistent with the doctrine of riparian rights. Both cannot exist together. The words "appropriator," "appropriation of water" and "unappropriated" have a clear and well-defined meaning and recognized by Congress, the legislatures of the States, and the courts. The laws of the States, the decisions of the courts and the Act of 1877 refer to "unappropriated" water.

II.

Nor have our Courts recognized or acknowledged the doctrine of riparian rights. On the contrary, however, they have recognized and enforced to the fullest extent the right and doctrine of appropriation.

A decision of a Court to have any binding force or effect, or to have any weight as authority, or as a guide to or rule of action, must be upon the question

presented to the Court for determination and decision. The language of the opinion is only the personal views of the Judge. This is especially true where a Judge writes an opinion expressing his personal views on a particular question.

The case of Thorpe vs. Freed, 1 Mont. 651, upon which counsel for appellee relies, does not decide, or in any manner hold that the doctrine of riparian rights was enforced or recognized in the Territory of Montana. In that case were involved the rights of appropriators only. The question of riparian rights was not involved, nor was the decision of the Court in any way influenced by the doctrine of riparian rights.

Judge Murphy tried the case in the court below, and was disqualified to sit in the appellate court. Judge Knowles and Judge Wade, who were recently appointed to the position of judge in that court, expressed their personal views in relation to the question of riparian rights, a question which was not involved in the case. They did agree upon the affirmance of the judgment of the lower court. That decision has never been cited by the courts of Montana as recognizing, acknowledging or establishing the doctrine of riparian rights.

In that case Judge Knowles said: "The question of whether or not a law is good for the people of our Territory is a matter for legislative and not judicial consideration. * * * If we were called upon to say what were the necessities of this country in regard to

the use of water for the purpose of irrigation, we would reply that there was a demand that water should be used for that purpose, and the considerations of the general welfare of the country, and the principles of natural equity, should guarantee to the prior appropriator of water for such use the first right to use the same to the extent of his necessities for domestic purposes, the quenching of the thirst of himself and animals and for agricultural purposes." * * *

"We hold, however, that the law that is a part of a system of laws, which our legislative assembly have adopted, cannot be annulled or varied by a court through any such considerations." * * *

"The plaintiffs must recover, if at all, upon their rights of appropriation. They have based their rights upon this and not as riparian proprietors." * * *

"Ever since the settlement of this territory, it has been the custom of those who settled upon any portion of the public domain, and devoted any part thereof to the purposes of agriculture, to dig ditches and to turn out the waters of some stream to be used to irrigate the same. This right has been universally recognized by our people." * * *

"In the second place, has this right been recognized by law?"

Here the Judge quotes section 1 of the Act of 1865, and then said: "This statute was in force at the time the plaintiffs made their appropriation of water, and

at the time the act of Congress (Act of 1866) above referred to became law." * * *

"This statute (Act of January 12, 1865), as far as it could established and recognized the right of appropriation of water for agricultural purposes." * * *

"As far as the legislative assembly of Montana had the power they repealed the common-law doctrine in regard to riparian proprietors."

He then discussed the subject of the recognition of these rights by the Courts and held that they are so recognized and said: "The right to appropriate water for the purpose of irrigation, in our opinion, has been acknowledged and recognized by the customs and laws and decisions of this territory. The law of Congress comes in and says that wherever, by priority of possession, the right to the use of water for these purposes has vested and accrued, the possessors and owners of such vested rights shall be maintained and protected in the same. This is, in effect, a grant to such parties of these rights."

"A grant cannot be divested by a subsequent grant. The words used in section 9 (Act of 1866) were, as I have said, in effect a grant. A grant made by law is as effectual as a grant made by deed or patent, and a subsequent grant of the land would be subject to any previous grant of water right. After a full consideration we are impelled to the conclusion that the right to appropriate water for the purpose of irrigation stands

upon as good, if not a better, footing as the right to appropriate water for mining purposes."

The judgment of the court below, recognizing the right of appropriation for agricultural purposes, was affirmed. Judge Wade concurred in the opinion by Judge Knowles, affirming the judgment of the lower court. He then commented on the provisions of the statute relating to the appropriation of water and the equity of dividing the water by commissioners as therein provided. But the Court below, however, held that that provision of the statute relating to the appointment of the commissioners was void because it conferred judicial power on commissioners.

Judge Wade presided as Chief Justice of the court until 1888 and in many subsequent decisions recognized the right of appropriation, and never recognized the doctrine of riparian rights.

The District Courts had prior to that case recognized the right to appropriate water. The Supreme Court also recognized that right.

Caruthers vs. Pemberton, 1 Mont. 111.

Harris vs. Schantz, 1 Mont. 212.

Columbia M. Co. vs. Holter, 1 Mont. 296.

Wollman vs. Garringer, 1 Mont. 535.

Atchison vs. Peterson, 1 Mont. 561.

In an unbroken line of decisions, the Supreme Court of Montana has recognized the right to appropriate water, and has never recognized or acknowledged the doctrine of riparian proprietorship or rights.

The case of Smith vs. Deniff, 24 Mont. 20, does not support the contention of counsel for the appellee. The Court in that case does not recognize or acknowledge riparian rights. The issue in that case was whether or not an appropriation of water, made by a person and used upon land to which he had no title, and the title to which land was thereafter acquired by another person became appurtenant to that land. The case is first reported in 23 Mont. 65. In the opinion there written, the Court held that the water right in such case became appurtenant to the land. The Court on its own motion granted a rehearing. The last opinion in 24 Mont. 20 was written by the same Judge who wrote the former opinion—Judge Pigott. All that was said by Judge Pigott outside of the issue as to whether or not the water right was appurtenant to the land when the owner of the water right had no title to the land is *obiter dictum*. However, when we examine and analyze the *dictum* of Judge Pigott, we find that he does not acknowledge or recognize riparian rights. On the contrary, he recognizes and acknowledges the right to appropriate water. The question which Judge Pigott in the *dictum*, embraced in the opinion, discussed is that a person may make an appropriation of water from a stream, if the appropriation is made upon public land or state lands, but that a person may not go upon lands of another to appropriate water of a stream unless he has permission to do so.

A person may not trespass upon the land of another to make an appropriation of water, or to construct a

ditch across his land, but he can obtain permission of the owner, or by proper condemnation proceedings acquire the right to go upon the land and make an appropriation or to construct a ditch to convey water.

In that case Judge Pigott said: "The right to appropriate water on the land of another for public use may be obtained through condemnation proceedings under the right of eminent domain."

He then referred to section 15 of article 3 of the Constitution of Montana, which is as follows:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use, and the right of way over lands of others for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith as sites for reservoirs necessary for collecting and storing the same shall be held to be a public use."

An act was passed, section 1894, heretofore quoted, which gives the right to conduct water *from* or over the land of another for any beneficial use.

The act of March 6, 1891, heretofore cited, which provided for condemnation of right of way for ditches was, under the provision of section 15, article 3, above quoted, held valid in Ellinghouse vs. Taylor, 19 Mont. 462.

The statute and the Court thus recognize the right to condemn land for the purpose of constructing reservoirs, ditches and making an appropriation of water.

The Supreme Court of the United States very early rec-

ognized the right to acquire the use of water in Montana by appropriation, and the abrogation of riparian rights.

In the case of Basey vs. Gallagher, 20 Wallace, page 670, the Court said:

"In the case of Atchison vs. Peterson, we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the Government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given that labor; that the miners on the public lands throughout the Pacific States and Territories by their cus-

toms, usages and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the Courts in those States and Territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for the purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the Courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."

This decision was made before the act of 1877, heretofore cited, was passed, and Congress by that act and by section 8 of the Act of 1903, the Reclamation Act, expressly disclaimed all right to the waters of the public domain.

These cases were appeals from the Supreme Court of Montana. The former was a mining case and the latter related to appropriations for agricultural purposes. Since the decisions of Atchison vs. Peterson and Basey vs. Gallagher, it has never been asserted or recognized in Montana that the doctrine of riparian rights does exist. No case has been presented to the Supreme Court in which the question of riparian rights was involved. The decision in Atchison vs. Peterson and Basey vs. Gallagher is binding upon this Court.

The case of Cruse vs. McCaully, 96 Fed. 369, is not applicable to the facts in this case, and while we have a

very high opinion of the learning and ability of Judge Knowles, his opinion is not binding upon this Court, nor can it be held as binding as a construction of the laws of Montana. On the contrary this Court is bound by the decisions of the Supreme Court of Montana construing the laws of that State. Furthermore the title in that case had passed from the Government, and in the case at bar the Government is still the owner of the land.

Mr. Kinney, upon whose authority counsel for appellee, seems to rely, after quoting and discussing the laws of Montana relating to water rights, says: "The statutes of Montana entirely ignore the rights of riparian proprietors. It is also to be noticed that from the very first the decisions of the Court are to the effect that rights to water can only be acquired by the appropriation of the same to some beneficial use or purpose, and that the common-law doctrine of riparian rights is not recognized or protected by the Courts." (Kinney on Irrigation, sec. 554.)

The Government of the United States has given to its citizens the right to go upon public domain and the right to appropriate and divert water for beneficial purposes.

This grant was given without modification or restriction. No officer of any department is given authority to suspend or modify the operation of that grant. While the land is the property of the Government the people have the right to go upon the land, divert and appropriate water and apply it to beneficial use. Does the grantor of the Government take title subject to this grant?

We have not found any decision of the Supreme Court

of the United States in which this particular question was decided since the adoption of the law recognizing the right to appropriate water, and from a state where riparian rights are not recognized.

The case of Sturr vs. Beck, 133 U. S. 541, was an appeal from the Supreme Court of the Territory of Dakota, in which the doctrine of riparian rights was clearly recognized by statute, as follows:

"The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue or pollute the same." Levisee's Dakota Codes, 2d ed., sec. 255, Civil Code.

III.

Counsel attempts to draw a distinction between the laws of Montana and the laws of Wyoming, Idaho and Colorado, and contends that because of such distinction, the decision of this court in the case of Krall vs. United States, 79 Fed. 241, is not applicable. There is no distinction between the laws of Idaho and Montana relating to the appropriation of water. Section 2582 of the Statutes of Idaho is the same as section 1885 of the Civil Code of Montana. Section 2580 of Idaho is substantially the same as section 1880 of Montana.

The provisions of the statutes of the other States do not give the State and citizens of the States any greater right than is given by the laws of Montana. The Government of the United States has granted them the right to go upon the public domain and appropriate water according to the local rules, customs and the decisions of its Courts. Recognizing that right, the laws of Montana provide how appropriation of water may be made and the rights of the respective appropriators determined.

The right to appropriate water on the public domain is given to the individual and not to the State or Territory, and the State or Territory cannot appropriate that which it does not own. The only right it can give upon the public domain is one that is already recognized and expressly given by the Government of the United States. The State cannot by its statute arrogate to itself the proprietorship of lands or water owned by the Government of the United States or interfere with the disposition thereof, or declare that these waters are the property of the State or public.

The recognition by the laws of the State of the right to appropriate water in accordance with the grant given by the United States, and the enactment of laws defining the manner in which appropriations shall be made was a legitimate exercise of the legislative powers, provided it does not interfere with the disposition of the public domain or the waters thereon.

The local rules, customs and decisions of the Courts and legislative enactments relating to water rights on the public domain are subservient to the powers of Con-

gress, and these laws, regulations and decisions were recognized by Congress in the Act of 1866, section 2339, Revised Statutes, and the Act of 1877 as amended by the Act of 1891.

The recognition of this right is analogous to the right to make laws relating to the location of mining claims.

Butte City Water Co. vs. Baker, 196 U. S. 119.
Erhardt vs. Boaro, 113 U. S. 527.
Kendall vs. S. J. S. M. Co., 144 U. S. 658.
Nothmore vs. Simmons, 97 Fed. 386.

This right is again expressly recognized in the Act of Congress, the Reclamation Act, 32 Statutes at Large, p. 390. Section 8 of that act is as follows:

Sec. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State, or of the Federal Government, or any land owner, appropriator, or user of water in, to or from any interstate stream or the waters thereof; Provided that the right to use the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

None of the Courts of the Pacific States recognize or acknowledge the doctrine of riparian rights, except California. The Civil Code of California, adopted in 1872, made provision for the appropriation of water.

That concluded act is as follows:

Sec. 1422. The rights of riparian proprietors are not affected by the provisions of this article.

## IV.

It is contended by counsel that the waters upon the lands in question were never open to appropriation, that they were never a part of the public lands. Section 3 of the act ratifying the treaty with the Indians expressly threw them open to settlement as public lands. See that section, quoted in full on page 35 of our former brief.

Section 2339, heretofore cited, recognizes the right to appropriate water on public domain. The Act of 1877 as amended by the Act of 1891, heretofore quoted, in express terms gives the right. Section 8 of the Act of 1903, last quoted, disclaims all claim to the waters on the public domain. Section 3 of the Act ratifying the treaty, heretofore cited, declares that these lands are a part of the public domain, thus placing them on the same footing as all other public lands, subject to the same grants.

It is stated by counsel for the appellee that the rights of the Government here to be determined are those incident to and growing out of the ownership of lands, held and used by it in the character of a private or proprietary

owner of a tract of land bordering on a stream, and set apart and appropriated for a particular purpose. (Page 14, appellee's brief.) We therefore find that the Government is in the position of an owner who has theretofore granted to the public the right to go upon its land and divert and appropriate water for a beneficial purpose.

We respectfully submit that there is nothing in the statutes of the State, or the decision of its Courts, or the decisions of the Courts of the United States, or the customs of the country, which will support counsel in his contention that the Government is entitled to the waters of Milk river by reason of its riparian ownership of the lands described in the bill of complaint.

Respectfully submitted,

E. C. DAY,

JAMES A. WALSH,

Solicitors and of Counsel for Appellants.